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ABSTRACT

Following an introduction, listing of the program for the Twenty-Seventh Annual Conference, and description of the Center, this conference proceedings contains the following papers: (1) "Some Thoughts and Facts on CUNY, Public Higher Education in New York State, and Accountability" (Augusta Souza Kappner); (2) "Academic Politics and Academic Futures" (Irwin Polishook); and (3) "Restructuring Public Higher Education and the Status of the Professoriate" (Terrence J. MacTaggart); (4) "Report Cards: To Reward or Punish?" (Mary Burgan); (5) "Three Dimensions of Accountability" (Judith S. Eaton); (6) "Collective Bargaining and Accountability in Higher Education: The Coming Transformation of Higher Education and the Place of Faculty" (Frank Newman); (7) "Academic Freedom and Politics" (Roger W. Bowen); (8) "Two Paradoxes for Academic Freedom" (Matthew W. Finkin); (9) "Stopping Slapp Suits: A Proposal" (Julius Getman and Ellen Dannin); (10) "Alice, the College Teacher, and the Rottweiler in Wonderland: The Prospects and Problems of Distance Education" (Joseph N. Hankin); (11) "Cyber Unionism: A New Blueprint for Organized Labor in Higher Education" (Arthur B. Shostak); (12) "Academic Collective Bargaining: The University of Wisconsin--Teaching Assistants Association Case Description" (Neil S. Bucklew); (13) "The Current Status of Graduate Student Unions: An Employer's Perspective" (Daniel J. Julius); (14) "Arbitration of Faculty Statutory Employment Claims: Lessons from the Corporate Sector" (Barbara A. Lee); (15) "The Arbitration of Faculty Disputes ADA, ADEA, and FMLA" (Robert T. Simmelkjaer); (16) "Pension and Benefit Issues Update Presentation" (Keith Rauschenbach); (17) "Legal Update: 1999--An Administrative Perspective" (Nicholas DiGiovanni, Jr.); and (18) "Eleventh Amendment Immunity and Academic Freedom" (Michael D. Simpson). (EV)

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COLLECTIVE BARGAINING AND ACCOUNTABILITY IN HIGHER EDUCATION: A REPORT CARD

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Proceedings

Twenty-Seventh Annual Conference

April 1999

CAESAR J. NAPLES, Editor

BETH H. JOHNSON, Conference Director

National Center for the Study of Collective Bargaining in Higher Education and the Professions
School of Public Affairs, Baruch College,
The City University of New York

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INTRODUCTION

INTRODUCTION

Since 1972, the National Center for the Study of Collective Bargaining in Higher Education and the Professions has provided labor and management practitioners and scholars with the finest research in higher education collective bargaining. Housed in and supported by the School of Public Affairs of the Baruch College of The City University of New York, (CUNY), the National Center is the only research center of its kind in the United States, specializing in the production and publication of important information and analyses of labor-management relations in the academy and the professions.

As we come to the close of this century, we find many challenges to accepted practices within the academy. **Collective Bargaining and Accountability in Higher Education: A Report Card**, the Twenty-seventh Annual Conference of the National Center, explored a number of these topics and provided penetrating insight into the problems facing higher education and the solutions suggested for coping with them. The keynote address by Benno Schmidt, former President of Yale University, who chaired the New York City mayoral task force on The City University of New York, discussed its findings with the Annual Conference. Anticipating the task force report, he spoke in general terms of developing a new vision for CUNY, and set forth an approach to reshaping public higher education throughout the United States. Schmidt's presentation raised questions about how to reconcile access and freshman remediation while maintaining academic standards and maximizing the educational impact of public expenditures on CUNY's programs. Conference attendees were treated to a discussion and critique of the task force report as it had been presented in the press by Augusta Kappner, President of Bank Street College of Education and former Assistant Secretary of Education, and Irwin Polishook, then President of the Professional Staff Congress.

Terrence MacTaggart, Chancellor of the University of Maine System, spoke on his book, *Restructuring Higher Education: What Works and What Doesn't in Reorganizing Governing Systems*.

The theme of a "report card," assessing the status of several challenges to the higher education community was carried out through a number of the conference sessions. State legislators and other public officials, increasingly mindful of the fiscal bottom line, have pressured faculty and administrators in institutions of higher education to document their productivity levels. The political emphasis on spending money "wisely" was contested by conference participants who denounced spending money "miserly" for the academy. The attention focused in recent years on questions of merit and accountability was discussed by Mary Burgan, General Secretary, the AAUP, Judith Eaton, President, Council for Higher Education Accreditation, and Frank Newman, President, Education Commission of the States.

Another session dealt with challenges to academic freedom. Two case studies were presented, including President Roger Bowen of SUNY, New Paltz, who stood

up to attacks by trustees as to the legitimacy of a conference sponsored by the Women's Studies Department of his college, entitled "Revolting Behavior: The Challenges to Women's Sexual Freedom." The circumstances of the public outcry regarding this Women's Studies Conference at SUNY, New Paltz, by elected public officials and State University of New York System officers, challenged both campus autonomy and the limits of academic freedom in the Empire State. A presentation by Kate Bronfenbrenner, Director of Labor Education Research at Cornell University, describe how she was threatened with legal action by an employer at a private corporation in connection with her research findings on responses to union organizing drives and alleged employer unfair labor practices. Two leading legal scholars, Matthew Finkin, University of Illinois, and Jack Getman, University of Texas, then addressed the implications of these and other recent academic freedom cases.

Technology is becoming an ever more important force throughout the world economy, and education is no exception. Joseph Hankin, President, Westchester Commuity College, gave a forward-looking view of the necessity of expanding the delivery of instruction through use of distance learning. Arthur Shostak, a professor from Drexel University addressed the need for the use of computers by progressive faculty unionists to develop overarching visions that support people, plans, and progress within the institutions that they represent in unique and dynamic ways.

Graduate student employee unions have been increasing in number and winning support for their legitimacy including a very recent NLRB New York regional ruling regarding New York University. Neil Bucklew, a faculty member and former president of West Virginia University who himself was a union organizer while in graduate school gave us an insight into the history of collective bargaining for graduate student employees by tracing its origins to the late 1960s at the University of Wisconsin at Madison. In another presentation, Daniel Julius, Associate Vice President of Academic Affairs at the University of San Francisco discussed various organizational and institutional factors in relation to the unionization of graduate students and how these differ from faculty collective bargaining relationships.

A number of human resources issues affecting faculty and administrators in higher education institutions rounded out the program. Two papers were presented that discussed the arbitration of faculty employment disputes. Barbara Lee, chair and professor of human resource management at Rutgers University examined the increasing efforts among a number of U.S. employers to require employees to sign mandatory arbitration agreements relinquishing their rights to a judicial forum. Robert Simmelakjer, an arbitrator, and a faculty member from City College, discussed the provisions of the Federal Family and Medical Leave Act (FMLA), the Americans With Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA). He outlined administrative procedures in relation to these laws, and the interplay between them as well as State Workers Compensation Laws. He also discussed the increasing use of alternative dispute resolution to handle work-related disputes. In a totally different area of human resources, Keith Rauschenbach, Second

Vice President of TIAA/CREF gave an update on their retirement and pension programs.

The National Center's annual update reviewing recent legal decisions affecting the academy was presented by Michael Simpson, Assistant General Counsel of the NEA, and Nicholas DiGiovanni, of Morgan, Brown, and Joy, of Boston, lawyers representing labor and management their different perspectives.

THE PROGRAM

Set forth below is the program of the Twenty-seventy Annual Conference, listing the topics and speakers. Some editorial liberty was taken with respect to format in order to ensure readability and consistency. If an author was unable to submit a paper, the name appears on the program, but the remarks have been omitted. Opinions expressed in the papers are those of the authors, not necessarily of their organizations or of the National Center.

MONDAY, APRIL 19, 1999

8:15 REGISTRATION and COFFEE

8:45 WELCOME

Carroll Seron, Acting Dean
School of Public Affairs, Baruch College

9:00 KEYNOTE: RESHAPING PUBLIC HIGHER EDUCATION

Speaker: Benno C. Schmidt, Jr., Director
The Edison Project

Presiding: Lois S. Cronholm, Interim President
Baruch College, CUNY

10:00 PLENARY SESSION - A DISCUSSION OF CUNY TASK FORCE REPORT AND ITS IMPLICATIONS FOR PUBLIC HIGHER EDUCATION

Speakers: Augusta S. Kappner, President
Bank Street College of Education

Irwin Polishook, President (retired)
Professional Staff Congress, CUNY, AFT

Moderator: Frederick Lane, Professor, Public Affairs, SPA, Baruch College

11:00 CONCURRENT SESSION - B
REPORT CARD ON MERIT AND ACCOUNTABILITY IN HIGHER EDUCATION

Speakers: Mary Burgan, General Secretary
American Assn. of University Professors

Judith Eaton, President, Council for Higher Education Accreditation

Frank Newman, President
Education Commission of the States

Moderator: John McGarraghy, Professor of Higher Education Admin., SPA, Baruch College

11:00 CONCURRENT SESSION - C
COMMUNITY COLLEGES: A LOOK AHEAD

Speakers: David Pierce, President
American Assn. of Community Colleges

Joseph Hankin, President
Westchester Community College

Dennis Bogusky, President, Federation of Technical College Teachers, AFT

Bette Marafino, President
Congress of Conn. Community Colleges

Moderator: Norman Swenson, President
Cook County College Teachers Union, AFT

2:00 CONCURRENT SESSION - D
REPORT CARD ON ACADEMIC FREEDOM

Speakers: Roger Bowen, President
SUNY, New Paltz

Kate Bronfenbrenner, Dir. Labor Education Research, Cornell University

Matthew Finkin, Professor of Law
University of Illinois, AAUP

Jack Getman, Professor of Law
University of Texas, Austin

Moderator: Rachel Hendrickson, Coordinator
Higher Education Services, NEA

2:00 CONCURRENT SESSION - E
SCENARIOS FOR FUTURE OF HIGHER EDUCATION: NEW PATTERNS OF COLLABORATION

Speakers: Carolyn Doggett, Executive Director
California Teachers Association, NEA

Arthur Shostak, Professor of Sociology
Drexel University

Moderator: Martin Morand, Director, Penn. Center
for the Study of Labor Relations

3:30 TECH SESSION - UPDATE ON
RETIREMENT AND PENSION ISSUES

Speakers: Keith Rauschenbach, Second Vice President
TIAA/CREF

Kurt Ritter, National Marketing Director
Metropolitan Life Insurance Co.

Donna Zucchi, District Manager
VALIC

Moderator: Samuel D Amico, Director Labor Rels. and
Assoc. Vice Chan., University of Maine System

TUESDAY, APRIL 20, 1999

9:30 PLENARY SESSION - F
ANNUAL LEGAL UPDATE

Speakers: Nicholas DiGiovanni, Esq.
Morgan, Brown, & Joy, Boston

Michael Simpson, Esq., Assistant
General Counsel, NEA

Moderator: Joan Gibbons, Esq., Hearing Officer,
Faculty & Staff Relations, CUNY

10:30 CONCURRENT SESSION - G
SCENARIOS FOR THE FUTURE:
RESTRUCTURING MULTI-CAMPUS SYSTEMS

Speakers: Roger Benjamin, President
Council for Aid to Education and Director
RAND, Education Program

Terrence MacTaggart, Chancellor
University of Maine System
Peter Salins, Provost and ViceChancellor
Academic Affairs, SUNY

Moderator: Herman Lujan, Chief Academic Officer
Connecticut State Univ. System

10:30 CONCURRENT SESSION - H
ARBITRATION OF FACULTY
EMPLOYMENT DISPUTES: ADA, ADEA, FMLA

Speakers: Barbara Lee, Chair, Professor of
Human Resources Management, Rutgers

Ira Shepard, Esq., Schmeltzer,
Aptaker, & Shepard, Washington

Robert Simmelakjer, Arbitrator and
Prof. of Administration/Supervision, City College

Moderator: Joel M. Douglas, Professor of Public Affairs,
SPA, Baruch College

12:00 PLENARY I - SCENARIOS FOR THE FUTURE: UNIONIZATION OF OTHER FACULTY

Speakers: Neil S. Bucklew, Professor & Past President
West Virginia University

Daniel Julius, Assoc. V.P Academic Affairs,
U. of San Francisco, Sr. Lecturer, Stanford
Graduate Schools of Business & Education

–Ricardo Ochoa, President, Association of
Graduate Student Employees, UC Berkeley

Moderator: Patrick Shaw, Esq., Director
Organizing and Services, AAUP

A WORD ABOUT THE NATIONAL CENTER

The National Center is an impartial, nonprofit educational institution serving as a clearinghouse and forum for those engaged in collective bargaining (and the related processes of grievance administration and arbitration) in colleges and universities. The National Center is a part of the School of Public Affairs of Baruch College, The City University of New York. The Center addresses its research to scholars and practitioners in the field. Membership consists of institutions and individuals from all regions of the U. S. and Canada. Activities are financed primarily by membership, conference and workshop fees, foundation grants, and income from various services and publications made available to members and the public. Among the activities are:

- An annual Spring Conference.
- Publication of the *Proceedings* of the annual Conference, containing texts of all major papers.
- Issuance of an annual *Directory of Faculty Contracts and Bargaining Agents in Institutions of Higher Education.*
- An annual *Bibliography, Collective Bargaining in Higher Education and the Professions.*
- The National Center *Newsletter*, issued four times a year, providing in-depth analysis of trends, current developments, major decisions of courts and regulatory bodies, updates of contract negotiations and selection of bargaining agents, reviews and listings of publications in the field.
- Monographs – complete coverage of a major problem or area, sometimes of book length.
- Elias Lieberman Higher Education Contract library maintained by the National Center, containing more that 300 college and university collective bargaining agreements, important books and relevant research reports.

ACKNOWLEGEMENTS

Members of the National Center's National Advisory Committee and our Baruch College Faculty Advisory Committee provided us with great ideas for speakers and topics for the conference. Baruch College professors Joel Douglas, Frederick Lane, and John McGarraghy provided important suggestions, encouragement, and support throughout the many months of conference preparation. We are, of course, grateful to all of the speakers and moderators who so ably presented papers and guided the conduct of sessions. A special thank you is due to Caesar Naples, Vice Chancellor Emeritus and Trustee Professor of The California State University who took on the task and did such a terrific job of editing this volume. The *Proceedings* and the conference are a group effort, and I gratefully acknowledge the help of all of those who assisted.

Beth Hillman Johnson
Administrative Director

I. RESHAPING AND RESTRUCTURING PUBLIC HIGHER EDUCATION

A. Some Thoughts and Facts on CUNY, Public Higher Education in New York State, and Accountability

B. Academic Politics and Academic Futures

C. Restructuring Public Higher Education and the Status of the Professorate

RESHAPING AND RECONSTRUCTING PUBLIC HIGHER EDUCATION

A. SOME THOUGHTS AND FACTS ON CUNY, PUBLIC HIGHER EDUCATION IN NEW YORK STATE, AND ACCOUNTABILITY

Augusta Souza Kappner, President
Bank Street College

When the participants were asked to present this panel, it was anticipated that the Schmidt Report on the City University of New York would have been published. Not having the report, the author, as former acting president of City College of New York, was asked to share her thoughts and facts on CUNY and public higher education in New York State and its relationship to this conference's theme of accountability.

The history of CUNY and how it relates to the University's mission and development.

As a former acting president of City College, I am fond of quoting Horace Webster regarding the founding of the 1847 Free Academy.

> "The experiment is to be tried, whether the highest education can be given to the masses, whether the children of the people, the children of the whole people, can be educated, and whether an institution of learning of the highest grade can be successfully controlled by the popular will, not by the privileged few."

For a century before the G.I. Bill opened higher education to the masses in the United States -- to those "intellectual hobos" as some referred to them -- New York City had a Free Academy -- secular, urban, open to all males over the age of 13. The formation of the Free Academy was in response to many factors -- urbanization, democratization, and the desire for many for access to an education which would help them prepare for the changing world of work in the mid-1800's. At the time, New York had only two colleges enrolling a grand total of 247 students, and high schools did not yet exist. So the Free Academy was designed to accept all graduates of the "common schools," i.e., the public schools, and to be a high school, an academy, a technical school and a college.

This was not unique in those days. In the 19th century, there were no definitive lines between college work and secondary work, and many institutions combined both. Today, a century and a half later, CUNY is the third largest public university in the United States and is still preparing the new middle class. Many of you know the data by heart:

- 42% of its students are from households with incomes under $20,000;
- 41% are over the age of 25;
- 59% are working full or part-time;
- 53% are the first in their families to attend college;
- 62% are female; and
- they hale from more than 140 countries.

Based on a review of the historical records, the admissions policies of CUNY for most of its history appear to be heavily based on supply and demand. As the population ready for college increased, both by age and numbers graduating from high school, standards were often increased to manage enrollment. Sherry Gorelick's book, City College and the Jewish Poor, has a narration that is informative.[1] It is a City College alumnus speaking:

> "When I entered CCNY in 1924 the entrance requirement was simply 60% high-school average (or 65% Regents average). When I started teaching [there] in 1928, the entrance requirement was still 60% high school average. In 1930, with the influx of applications for admission from high school graduates affected by the Depression, I watched the entrance requirement screwed upward year by year from 60 to 65, 68, 70, 72, 75, 78, 80, 82, 85 and 88 by the time I left the college in 1941. The reason for this escalation had absolutely nothing to do with academic standards but everything to do with economics: the College had [only] so many seats that could be filled by entering freshmen. Those for whom there was no room had to be excluded. The escalating entrance average was an economically based exclusionary technique designed to cope with the surge of students towards higher education (a surge that gave birth to Brooklyn College, Queens College... etc.). Therefore, Open Admissions in 1970 was a reversion to the tradition of Open Admissions for high school graduates that had obtained from 1847 to 1930. All the Jewish students considered in your study were the beneficiaries of Open Admissions. Neither I nor many other Jewish students could have entered CCNY had the entrance requirements been 88 (as they were in 1941-1969)..."

By the 1960's, applicants to the senior colleges -- the 4-year colleges in CUNY -- were required to take the SAT's and admissions policy was based on a combination of high school average and test scores. CUNY, by then newly constituted as a university, did not have room for all who wanted to attend. In the 1960's, the baby boomers caught up with CUNY. The year 1964 saw the largest high school graduating class in New York City ever, and CUNY had to reject two-thirds of its applicants, many of whom were Black and Hispanic.

There was also recognition at this time that, although the University had grown significantly in size, the proportion of minorities had remained the same and, in some cases, declined. Minorities comprised only 5% of the CUNY population in the mid-1960's.

Everyone was intensely aware of the pressure to create greater access for high school graduates. State reports, since the 1940's, had been documenting the need to expand access to both increase the numbers and broaden the social and economic mix. But the admissions pie was shrinking and freshman enrollment had been declining from the 1950's. Ultimately, the pressure of the civil rights

movement, campus demonstrations and lots of politics could not be ignored and in 1970, the CUNY master plan was accelerated five years to create what became known as open admissions.

Open admissions tried to accomplish several things for students and several things for New York City:

- Some university program was to be provided to all New York City high school graduates.
- Remediation and supportive services were to be provided to all those who needed them.
- Academic standards of excellence were to be maintained and enhanced.
- Ethnic integration of the colleges was to be achieved.
- Mobility was to be provided to students between various programs and units.
- And last but not least, open admissions sought to insure that all students who would have been admitted to specific colleges under the past admissions criteria should "still be so admitted."

So it took the crises of the 1960's to rectify long years of ignoring pressures around admissions and long years of state neglect of public policy for higher education to create a system which took nothing away from anyone but which created access for the many ... again. Unlike the California system, most (60%) of the students in CUNY entered at the four-year college level rather than the community college level, there having always been symbolic meaning attached to the four-year colleges.

Although open admissions was modeled on the special programs of College Discovery and SEEK, it was never funded in the way that these programs were funded.

Open admissions ended in 1976 when, again in another fiscal crisis, new competitive admissions standards were initiated as a way to reduce the number of entering freshmen. And an exchange was made: state funding of four-year colleges and tuition for all the CUNY colleges. In that 1977 post-admissions entering class, there were 11,000 fewer freshmen. Again, changing admissions policies at the caprice of politics.

Although CUNY has had skills tests and proficiency tests in place from at least 1976, and well before I believe, the general public continues to regard CUNY as an open admissions system. Our current controversial issue of remediation is certainly not new to CUNY or to other colleges, but the public attention and controversy focused on remediation is new. In part because higher education is now such a big industry, it has become more newsworthy and more subject to scrutiny. A recent study by the Institute of Higher Education Policy on Remediation reached several conclusions about remediation nationwide.[2] It concluded:

- that it's always been with us -- 78% of colleges and universities nationally provide some type of remediation;

- that there are no consistent standards of "college level work";

- that there is no evidence that remediation has grown during the 1980's and 1990's;

- that there is no evidence that remediation costs more than regular academic courses;

- that there is no clear evidence that outsourcing remediation is either cheaper or produces better outcomes;

- that remediation is a good investment -- it's cheaper than paying for unemployment, prison or welfare; and

- that the consequences of not providing remediation are great since general access to higher education is essential for today's jobs and skills, and beyond the private individual benefits of higher education, there are the public benefits of an educated population: greater productivity, reduced crime, and a more active citizenry.

The work of David Breneman supports these conclusions. He has concluded from his yearlong review that remediation consumes less than 1% of higher education funds and, therefore, policy around remediation should not be based solely on cost factors.

Breneman & Haarlow also point out in their recent Chronicle[3] article that even though remediation passes the kind of cost benefit tests that we usually apply to social programs, very little is known about the effectiveness of different modalities of remediation and the needs of different students.

Somehow to me it seems very sad that at CUNY where there is data, and where there is a concentration of faculty who have developed approaches and curricula in this area over the years, that there is not some way to de-couple this from the over-politicized situation and actually study the different approaches and share this knowledge with the rest of the nation.

The current remediation wars make no sense outside of the context of the national movement for standards and accountability, which has characterized K-12 education for several years now, and which along with a tendency to blame teachers for all the ills of the world, has now moved to higher education. Although it is still most readily seen in K-12 where 49 states have in place some set of state level academic standards, many states have established teacher preparation standards, including New York State, and many states now have sanctions for both K-12 systems and teacher education schools that do not meet the new standards.

So we can be sure that standards in this sense will come to higher education.

Lest I be misunderstood, I have nothing against standards and accountability. Not one of us would go to a doctor who does not meet some accepted standard. As President of Bank Street College, I want to be held accountable for the work of the teachers and the principals whom I prepare. We at

Bank Street are very pleased that our teachers do so well on the state certification exams, but we do not believe that that tells us whether they are, or will be, good teachers. We do not know that until they are in real classrooms with real children. I have no problems with teachers and students being asked to demonstrate what they know and what they can do, but I'm not convinced of accuracy of the assessment tools we are currently using. The questions with standards are always who sets them, how they are measured, and how we avoid moving from useful and meaningful assessment to simple minima which, in and of themselves, can dumb down what is taught and what goals are sought. Whatever our particular standards are, we have to consider equity; the standards have to be communicated broadly; and resources have to be provided to meet the standards.

Dr. Schmidt has remarked that higher education is one of the least accountable sectors in society. I agree. And I agree that there will be change. Increased government scrutiny is inevitable. However, whatever standards and outcomes we embrace, they have to be linked to the needs of the people of New York State and New York City.

While we may yearn for the days when a four-year graduation rate was a rational target, four- and three-year graduation goals are totally irrelevant under today's conditions. There is a tendency today to engage in golden age thinking -- reminiscing about a past era when things were better, greater, and simpler. Depending upon our age, we revert to the 80's, 70's, 60's, 40's, and 20's -- the times when things were better, when perhaps all students were above average. Leon Botstein[4], in his book, Jefferson's Children, refers to this as "selective nostalgia" and he does not buy it.

> "The best argument that there was never a great curriculum that has been recently dismantled, is the behavior of the alumni of our colleges and universities. Over a quarter of a century of dealing with alumni from many institutions has convinced me," he says, "that there is no long-term evidence that the college curriculum of the past was superior in leaving residues of cultural curiosity, civic idealism, civility and intellectual self-discipline. Much of what we complain about in today's world is the work of the graduates of the so-called great curricula of the past, the college graduates of yesteryear. Once again, misplaced nostalgia makes for bad public policy."

This is a phrase that it would behoove us to repeat almost as a mantra for CUNY: "Misplaced nostalgia makes for bad public policy."

So what are rational non-nostalgic people to do? First of all, we must keep the mission clear and uppermost. It is the same today as it was in 1847. Excellence and access for urban students is as needed for New York today as it was in 1847.

Second, we must continue countering inaccurate data and providing good information -- information on who needs what in basic skills and e.s.l. (English as a Second Language) -- who and how many do what in what kinds of courses. The issue of time needed to learn is important also. Distance institutions are uncoupling learning time from seat time. And remediation, in part, is an issue of time. Try to redefine this. Try to begin to reframe this issue. Keep forming K-12 and higher education collaborations -- I would say pre-K through higher education collaborations. There is a great need for us to rethink totally the whole pre-school

to post-secondary links and how the two sectors can stop competing and work together to educate everyone.

Third, continue to demand more of ourselves. Consider different ways of doing things. Collect data on different ways of doing things. Don't cling to the idea that every unit of the university has to provide everything. Use the advantage of being a multi-campus system. It's the only way that you will remain a system.

Dr. Schmidt is right that it is in CUNY's best interest to embrace strong clear standards because few face the challenges -- or at least the magnitude of the challenges, both in terms of students and political challenges -- that CUNY faces.

CUNY does have a responsibility to demonstrate outcomes, as I believe all higher education should. What these should be, however, would take us a series of conferences to debate -- how important graduation rates should or shouldn't be, for example. There is ample evidence, however, that CUNY graduates go on to do well in work and life. Use and publicize the evidence.

Keep pointing out the strong economic links, the congruence of the areas in which CUNY prepares students with the workforce needs of the state, the tax revenues generated, the dollars spent here where most CUNY graduates remain.

Fourth, organize. This is a collective bargaining conference, so this message should not be a difficult one to hear. But we will need collectivity that goes far beyond the boundaries of several unions on this.

And, we must all demand more of our state with regard to higher education. This is an issue for both public and independent higher education -- but obviously one that affects CUNY strongly. According to Commissioner Mills, New York ranks first in those making it to college but not first in those making it out or through. We know that New York ranks 49th or 50th in per capita funding for higher education, and that New York State is the only state that funds its colleges at a lower rate today than it did in 1988. Why is this? Are these facts related?

Other than teacher education issues, there has not been a hard policy look at New York's higher education needs in a long, long time.

- What are the higher education needs of New York State?
- What are the higher education goals of New York State?
- What plan can be put in place to finance meeting these goals beyond the major budget haggling of the two major university systems?
- How can and should higher education in New York State relate to the social and economic needs of the State?
- What are the social and economic benefits New York wants to see from higher education?
- Are we doing all we should be doing in this time of economic prosperity to prepare the City for the inevitable turnabout and what role can education play in this?

- Do we want our community colleges to become primarily remedial institutions? What do we lose if that happens?

- How can we as a state support the improvements in pre-K-12 education? I note that not only the higher education budgets for CUNY and SUNY are devastated in this executive budget but the funds recommended by the Regents to help meet new K-12 standards are also not there.

- What are the likely consequences for New York City and New York State if we do not plan for the future of higher education in the State?

While the CUNY dialogue is a part of a national manifestation -- a dialogue around national issues on standards and, to some degree, affirmative action -- they are issues that will be resolved locally. Lots of states are facing increases in high school graduates without increased investment in higher education. If this is the case while the economy is good, it may be exacerbated by the federal tax credit policy when the economy weakens as states seek to reduce higher education investment further.

States will continue to be the major policy players, and higher education will grow in its role as gatekeeper to the middle class. That is the American Dream we have created. There is no going back from that, and we are heading for deep trouble unless we acknowledge and plan for that fact.

And finally, on a more humane and individual note, somewhere, embedded or camouflaged in policies and practices has to be the recognition that ability and promise are often real hard to spot. Someone recently shared this quote with me and I share it with you:

> "There is something that is much more scarce, much more rare than ability. It is the ability to recognize ability. Average people have a way of accomplishing extraordinary things for teachers and leaders who are patient enough to wait until ability becomes apparent. The history books are full of stories of gifted persons whose talents were overlooked by a procession of people until someone believed in them. Einstein was four years old before he could speak and seven before he could read. Isaac Newton did poorly in grade school. A newspaper editor fired Walt Disney because he had no good ideas. Leo Tolstoy flunked out of college and Warner von Braun failed ninth grade algebra. Haydn gave up of ever making a musician of Beethoven, who seemed a slow and plodding young man with no apparent talent -- except a belief in music. There is a lesson in such stories: different people develop at different rates and the best motivators are always on the lookout for hidden capacities."[5]

In New York State, we must strive to develop the capacities of all of our people.

ENDNOTES

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[4]Botstein, L. (1997). *Jefferson's Children: Education and the Promise of American Culture.* New York: Doubleday

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RESHAPING AND RESTRUCTURING PUBLIC HIGHER EDUCATION

B. ACADEMIC POLITICS AND ACADEMIC FUTURES

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The grandeur of American higher education is recognized throughout the world. Not only is the American model much esteemed abroad, but in the exchange of students the favorable balance for the United States clearly marks our preeminence. It is worthwhile to consider at least one essential foundation of this contemporary achievement.

With the millenium coming to an end, it seems clear that autonomy is a feature of American academic institutions whose importance is probably little appreciated. Yet the independence of our colleges and universities is what secures their vitality. Consider the earliest stages in our experience, referring back to the Dartmouth College case assuring the charter guarantees of these developing institutions, the reverence afforded public education with precedents established first in the Northwest Ordinance of 1787 and two Morrill Acts giving away public lands to spur the growth of broadly based places of higher learning, or the fiercely defended concept of academic freedom conceived by faculty and administrators alike as needed to foster the intellectual enterprise. Politics and politicians were considered — in that now antiquated Puritan phrase borrowed from scripture — as "nursing fathers" to American universities over the course of our history.

The question before us is whether the American academy is now poised to cope with a political assault that will undermine its valued autonomy?

The Schmidt Task Force studying the mission of CUNY should be seen as a chapter in this evolving history. Despite familiar and sometimes contentious controversies within the academy regarding the future course of higher education, the Schmidt Task Force represents the current political establishment both in its goals and appointees. No measured respect has been shown here for academic sensibilities. The New York City Administration put forward this enterprise without the slightest modesty in its scope and indictment.

We should be concerned with the basic premise of the Mayor's initiative. This is not an investigation designed to promote the general educational needs of

the diverse populations now seeking a better future through higher education. Privatization and further investigations were promised by the Mayor's Executive Order establishing the Task Force. Prudence might have demanded that the higher education needs of New York City's population — a majority of minorities — start with CUNY but include SUNY, private colleges, the public and private educational systems of K to 12, as well as the many public agencies and private organizations that relate to higher education. Should not CUNY's mandate and achievement be examined in the context of the role and potential of these institutions? Instead, the Mayor denounced CUNY with the force of an academic sledgehammer.

Let me make plain what the indictment consists of. It alleges that CUNY has no standards, teacher education is a disaster, few ever graduate, remediation is overblown and ineffectual, and CUNY's distinction is only an extinct glow from a golden past.

Not only is the accusation severe. This rhetoric is without measure.

Should we accept words that say that CUNY is "in need of even more reform than the public school system," or that the consequences of Open Admissions have been "cruel," offering students "false expectation," "continually defining down standards," and "relentless decline" without so much as a nod to a counter reality ignored in a welter of political declamations. What trust can be given to a governmental officer who looks at the institution's defense as "one of the silliest things I've ever heard," and recommends "that's a system we'd blow up."

What must first be considered is what CUNY is asked to do. The 1979 New York State CUNY Governance and Finance Law contains a direction for CUNY to focus on access, excellence, an urban orientation, and articulation between the two-and four- year colleges, within a system whose integrity was guaranteed by law. Section 6201 of the Education Law states clearly:

"The legislature intends that the City University of New York should be maintained as a independent system of higher education governed by its own board of trustees responsible for the governance, maintenance and development of both senior and community college units of the city university. The university must remain responsive to the needs of its urban setting and maintain its close articulation between senior and community college units. Where possible, governance and operation of senior and community colleges should be jointly conducted or conducted by similar procedures to maintain the university as an integrated system and to facilitate articulation between units.

The legislature's intent is that the city university be supported as an independent and integrated system of higher education . . . and expand its commitment to academic excellence and to the provision of equal access and opportunity for students, faculty and staff from all ethnic and racial groups and from both sexes.

The city university is of vital importance as a vehicle for the upward mobility of the disadvantaged in the city of New York. The pioneering efforts of the SEEK and College Discovery programs must not be diminished as a result of greater state financial responsibility for the operation of the city and state of New York.

Only the strongest commitment to the special needs of an urban constituency justifies the legislature's support of an independent and unique structure for the university . . . . In its urban environment this commitment should be evident in all the guidelines established by the board of trustees for the university's operation, from admissions and hiring to contracting for the provision of goods, services, new construction and facilities rehabilitation."

It is difficult not to contend that the independence of CUNY is endangered by a political intervention that distorts its mission, is impervious to CUNY's achievement, ignores the fiscal problems that afflict its operations, provides some Trustees for the system who are employed otherwise in the Mayor's administration, makes evident its interference in academic decision-making by interviewing candidates for Chancellor, and offers only a steady stream of invective and threat in order to reverse the legislative mandate that still affords the template for CUNY's service to the people of New York.

Moreover, what autonomy can one expect of the Task Force itself? In advance of his appointment, Dr. Schmidt gave voice to the Mayor's agenda by asserting, "It is critical... that we restore the highest quality education standards at CUNY, so that a CUNY education provides a real opportunity for success after graduation." This was promulgated prior to any investigations, research, public hearings, or even an initial meeting of the appointed members of the Task Force. This is academic politics in which external politics eradicates in advance any defense and defames in advance any supporter of the university, even those willing to argue for change. Ironically, both the university and the Task Force will have little academic legitimacy if this political surge continues unabated.

The independence of CUNY is showing signs of fragility in the face of these political interventions. An article in the *New York Times* on March 24, 1999, merely confirmed a lack of direction from the Board of Trustees and offered a too honest (if embarrassing) assessment of the factional struggles among individual sets of Trustees. Much more alarming is the instability in the CUNY administration. At the moment we have an Interim Chancellor who leads a cast of more than a dozen who serve in such acting capacities as Deputy Chancellor, Vice Chancellors, Presidents, and Academic Provosts in the absence of completed searches for replacements. We have instability within the university that is severely damaging to administrative and faculty morale. We may set a world record for temporary appointments when the final scorecard is reviewed in future years.

My responsibility in this forum is to respond to some of the misrepresentations of the CUNY story. I offer in sequence a listing of items that respond to criticism of graduation rates, standards, student success after graduation, and specific programmatic records in teacher education and remediation:

(1) Graduation Rates. While graduation rates at CUNY are initially lower than elsewhere, this is because few students are able to go to college full-time on a continuous basis. Only 25 percent of CUNY students are 18 years old, a current high school graduate, and a full-time student. Forty percent are over 25 years of age, 59 percent work long hours, and a majority of the student body are women. Most students who graduate become part-time at some point in their enrollment at CUNY. Given the realities of urban commuters who attend CUNY, a predominance of lower-income students, most of whom are women and many of whom are minorities and foreign born, only the most unusual circumstances would make it possible for the two-year and four-year graduation models to apply. This is surely the reality in most public institutions and is not limited to the vast number of community college students everywhere in the United States. What the facts show is that CUNY has long-term degree completion rates that are comparable to those of other colleges and universities, especially those in urban settings. Data collected by the National Center for Education Statistics in a recent analysis reveals that 23.8 percent of freshmen who entered two-year public colleges nationwide graduated five years later. At CUNY, 27.9 percent completed degrees in five years, whether within this system or after transferring elsewhere. Similarly, the six-year graduation rate for bachelor's students attending a mix of 13 public urban colleges is 33 percent, compared to 32 percent at CUNY.

(2) Graduation rates have not declined recently. They have shown improvement. At the community colleges, eight-year degree completions have gone upward since the early 1980's, from 26 percent for the entering class of 1980 to 29.1 percent for freshmen beginning in the fall of 1988. At the senior colleges these rates rose even more substantially, from 31.6 percent for 1980 freshmen to 40.1 percent for 1988 freshmen.

(3) CUNY students who leave the University without completing a degree often do so for non-academic reasons. Just over one-third of those leaving associate degree programs do so in good academic standing, while among bachelor's degree students, more than one-half of those departing leave in good standing. Work and family obligations are cited most often as reasons for leaving. Consequently, even if measures of academic preparation such as high school grades, skills test results, SAT's, and other entrance examinations predict academic success and so-called "on time" graduation at CUNY, they will never be predictors of degree completion given the social and economic background of our diverse student population.

(4) A recent survey shows that large numbers of apparent CUNY dropouts are transfers, mostly to local private institutions. Of students who leave CUNY, 50 percent of those departing from bachelor's programs enroll elsewhere as do 39

percent of the community college dropouts. Fifteen percent of CUNY students complete their degrees elsewhere.

There was once a time in the golden past, as Professor Nathan Glazer has written eloquently of CCNY students, when some were hailed as campus heroes when they attended at night and took six or seven years to graduate. Why should student persistence, which compares favorably to the national experience, be denounced today? Does this rhetoric not expose the real danger that these mean-spirited assaults represent for the most disadvantaged and deserving among us? Should raw politics rather than carefully developed academic realities determine the policies of the public academy?

And now for the matter of standards:

(5) All senior colleges have increased admissions requirements for baccalaureate students in the past few years, whether SAT scores, grades from high school, or place in the top tier of the senior graduating class. No doubt this trend will continue if each four-year college is permitted to adjust its expectations of incoming students.

(6) CUNY freshmen are better prepared in various subjects than earlier cohorts in the 1980's. The College Preparatory Initiative (CPI) has outlined specific courses for high school students applying to CUNY. In 1990 only 66 percent of applicants completed 4 or more units of social studies; the number in 1997 is 81 percent. In 1990, 63 percent completed 2 or more units of foreign language; in 1997, the figure is 74 per-cent. By 1997, 86 percent of freshmen completed 1 or more units of lab science; in 1990, the number was 55 percent. In 1990, only 65 percent completed 1 or more units of sequential math; by 1997, the figure was 92 percent. English course taking has improved from 43 percent with 4 or more units to 66 percent in 1997. These improvements occurred despite a public school system in which 25 percent of middle and high schools do not have enough textbooks for each student; 33 percent have inadequate access to school libraries, with 10 percent having no library whatever; 74 percent of the city's elementary schools are not wired for the Internet; and 21 percent of high schools as well as 33 percent of middle schools do not have functioning science laboratories. Given time, even better preparation of incoming students is what CPI and collaboration with the public schools will achieve.

(7) The university is committed to collaboration with the schools in order to improve the capabilities of incoming students. Among the hundreds of programs connecting CUNY and the public schools two are notable. The university operates alternate schools under the sponsorship of several campuses, utilizing regular high school teachers, with a remarkable reputation for success. College Now gives thousands of high school students an early flavor of college preparation by testing their academic competencies before they apply to CUNY. This program also offers juniors additional pre-collegiate course work while in high school during special Board of Education "extended time" study periods, allowing students to anticipate college by participating in on-campus activities and, for qualified

seniors, taking college courses in their own high school buildings. This program will be mounted by every CUNY campus in the near future with additional emphasis on the new New York State Regents examinations.

(8) CUNY graduates compete successfully for admission to graduate programs and go on in impressive numbers to complete advanced degrees. In a survey of the baccalaureate origins of Ph.D. recipients between 1983 and 1993 (the era of Open Admissions), the National Research Council found that 3,877 Ph.D.s had attended CUNY, more than the graduates of Columbia, NYU, SUNY/Albany, and the University of Chicago combined.

(9) Our university ranks first among comprehensive higher education institutions in the number of graduates who earn degrees in science. We lead the nation in the number of African-Americans who have won science and engineering degrees outside of historically black institutions.

(10) CUNY ranks first in the country in the number of undergraduates who have become top corporate executives. CUNY has held first place since 1990 when it passed Yale and the University of Wisconsin.

(11) CUNY has the largest educational computer operation anywhere. Our university was one of the original collaborators in the establishment of BITNET, the first inter-institutional computer network and a direct predecessor of the Internet. The first E-mail transmission was between CUNY's 57th Street Computer Center and the Yale University campus in New Haven.

(12) Despite efforts to explain why the low scores for CUNY teacher education programs were not indicative of our efforts in this area, the university was the subject of a round of denunciations competing with the extravagant rhetoric described earlier. In fact, in a recent presentation by the Task Force Chair at the New York City Bar Association (February 25, 1999) there was a repetition of this indictment without waiting for the State Education Department to report on the latest and more accurate findings for CUNY. What we now know is the pass rate for CUNY's students who have completed the requirements of our approved degree-granting teacher education programs averages 91 percent for provisional certification and 89 percent for permanent certification. This was achieved by including only CUNY-educated students in the class of test takers for whom we were responsible and other improvements in admissions, counseling and curriculum over the past several years.

(13) One would think remediation is the bane of CUNY's existence. This is true only if one wishes to ignore the weakness of high school diplomas that are only now undergoing the greatest scrutiny. Is CUNY responsible for social promotion? Do our faculty oppose the utilization of the Regents Examinations as a standard for college preparation and maybe admission to college? There is a good bit more of complexity to the subject of remediation if one looks back into the performance of the public schools. As they improve, so will CUNY freshmen.

Yet everything connected with remediation inflames academic discourse. Dr. Schmidt himself identified 70 percent of all students at CUNY as candidates for remediation, compared to 30 percent in the rest of higher education. In the fall of 1998, however, just 21 percent of all regular degree-seeking undergraduates at CUNY were taking one or more basic skills courses, not 70 percent of all enrolled students. Nationally, 29 percent of first-time freshmen, not all undergraduates, were enrolled in a basic skills course in reading, writing, or math in the fall of 1995 (according to a report of the National Center for Education Statistics). For four-year institutions the proportion was 22 percent, while for two-year colleges it was 41 percent. (These figures may be higher in 1998.) At CUNY in the fall of 1998, 33 percent of freshmen regularly admitted to bachelor's programs were taking some remediation, limited to no more than one year, as were 70 percent of those freshmen who held high school diplomas and were enrolled at community colleges.

We should note that the latest analysis shows that CUNY spends about 10 per- cent of its overall instructional budget on remediation (about 4 percent at the senior colleges). Seventy-eight percent of all colleges in the United States offer remedial work to matriculated students. At CUNY's four-year colleges most students completed their remedial work within one year; at the community colleges, students who remained as matriculants were able to complete these requirements in less than four semesters. Remedial work at CUNY carries no academic credit. The graduation rates of students taking remediation was 43 percent compared to 48 percent of those admitted without any basic skills requirements.

There is surely room for extended debate about the advisability and efficacy of remediation, particularly in light of the CUNY Trustees'decision to eliminate remediation for matriculated students at the senior colleges. It is not possible, however, to dispute the fact of remediation's success for many students and its favorable impact on returning students, whether transfers from other colleges or adults who make up the greatest proportion of CUNY undergraduates. Politics should not obscure this reality. Nor should advocacy obscure its limits and complexities.

No one should be hesitant to enter the public debate about the value of public higher education. But how often have you heard a measured recital about the importance of CUNY and its educational success? This recital should be of value if only to provide some positive outcomes in measuring CUNY's contribution to the public well being and to balance ideological intrusions that misrepresent the CUNY reality.

The City University of New York is at a critical juncture in its 150-year history. With perhaps one exception in the last decade, the university has been offered either declining or zero-based budgets which have caused substantial academic distress. The number of full-time teaching professionals has declined by about a thousand in the 1990's alone, resulting in a vast increase in part-time positions. We face a vanishing professoriate at CUNY, as is the case nationally,

particularly among the community colleges. Today 46 percent of instruction at the senior colleges and 58 percent at the community colleges is offered by temporary teachers. Our students have also been buffeted by substantial impediments beyond merely meeting the academic standards that do prevail. Otherwise, every student would quickly get passing grades on the road to graduation within the mythical two-year and four-year time sequence so neatly endorsed by some politicians. Since 1970 state appropriations for each full-time student has fallen from $7,004 to just over $5,000 in 1997. Tuition increased over the same period since 1969-1970 by over 150 percent at the senior colleges; it rose 105 percent at the community colleges. Doing more with less is the hallmark of academic heroism at CUNY as it is elsewhere in the world of higher education.

The issue at CUNY is not one of standards or academic achievement or accountability. The faculty and non-classroom academic staff who make up CUNY's professional workforce have always championed high standards for students, quality scholarship for themselves (as illustrated by the two CUNY professors who just won the Pulitzer Prize in history), and professional accountability. At each juncture in the history of this university, whether under the weight of financial difficulties or faced with a new generation of students with new academic needs, or challenged by a changing economy or novel technologies, the faculty and staff have innovated and adapted their curricula, their teaching methods, and their admission standards to keep CUNY at the forefront of quality higher education in the nation.

It is a misfortune that politics has penetrated to the very heart of the debate about academic life at CUNY. Politics admits no qualification. Are we back again to the struggle over democratic access to the university in this greatest of all American cities? Are we to have a new discourse about poverty, immigration, and minorities in which academic opportunity is repudiated and ignored? Is the academy's role in combating inequality irrelevant in this most dynamic city with no ethnic majority? The legacy of CUNY should provide the moral response to these insistent questions before we pass into the always-uncertain future of another century.

RESHAPING AND RESTRUCTURING PUBLIC HIGHER EDUCATION

C. RESTRUCTURING PUBLIC HIGHER EDUCATION AND THE STATUS OF THE PROFESSORIATE

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INTRODUCTION

From the late 1980's through the mid 1990's, several states initiated dramatic changes in the way they governed and managed public higher education. Some states consolidated control of systems of institutions and colleges and universities themselves under fewer trustees, while others increased the autonomy of individual institutions by reducing central authority. In Minnesota and Maryland, for instance, previously separate systems with their own boards of trustees were consolidated under a single board. By contrast, Illinois eliminated two system boards in favor of university boards and New Jersey jettisoned its powerful coordinating board in favor of local campus governance.

This article summarizes the governance restructuring movement in this period, notes briefly the role faculty played in the change, then speculates on likely next steps in the redistribution of power in higher education along with the possible impact of the status of the professorate. Much of the background for these observations comes from two books I edited, *Restructuring Higher Education: What Works and What Doesn't* (Jossey-Bass, 1996) and *Excellence Through Independence: Liberating Public Colleges and Universities from Excessive Regulation* (Jossey-Bass, 1998).

DEFINITIONS OF RESTRUCTURING

Higher education restructuring during this period reflected the worldwide interest in organizational change often described as reinventing or reengineering. In the for profit sector, these changes typically included both fundamental changes in work processes and substantial reductions of personnel at all levels. Restructuring in higher education took a somewhat different turn including:

- *Governance restructuring* -- change in authority at the level of institutional or system boards of trustees and/or involving statewide coordinating boards and similar agencies

- *Academic restructuring* -- change in the role of faculty usually in the direction of reducing their authoritative role in the teaching-learning relationship in favor of a coaching or mentoring role

- *Administrative restructuring* -- refers to a variety of initiatives such as decentralizing authority to lower level units, outsourcing and privatizing services such as campus maintenance, residential hall management, bookstores, and so on

- Mutual growth mergers -- the voluntary amalgamation of two or more independent or private colleges in order to emerge as a stronger new entity (see Martin and Associates, Merging Colleges for Mutual Growth: New Strategies for Academic Managers, Johns Hopkins University Press, 1994.)

- *Expansion of for profit academic programs* -- development of institutions on a national or regional scale that seek to increase shareholder wealth through marketing academic programs

- *Virtual universities and networks of universities* -- offering courses and degrees via such alternative delivery means as the internet, satellite, interactive television, and other avenues for delivering education at a distance.

GOVERNANCE RESTRUCTURING

To oversimplify only slightly, governance restructuring during the period followed two contradictory paths. One, the new oligarchy, consolidated authority for more institutions, resources, faculty and students under fewer overseers while the other, the new autonomy, displaced authority downward from states or systems to individual colleges and universities.

THE NEW OLIGARCHY

From the late 1980's and into the early 1990's, consolidating the reins of powers in fewer hands represented the dominant trend. Thus the governing board of the University of Alaska in 1987 reorganized to bring all public four and two year institutions under three main campuses: Fairbanks, Anchorage and Juneau. A year later the state of Maryland merged two separate systems, the University of Maryland's institutions and the state colleges, into one system with a single governing board. In 1990, North Dakota converted what was really a federation of institutions into a system under a strong chief executive. That same year, the Minnesota legislature passed a bill merging three separate systems into one, comprised of some 64 institutions. The actual merger in Minnesota took place four years later. Massachusetts restructured in 1991 in a complex series of

maneuvers, which generally gave increased authority to a statewide board with both governing and coordinating power.

These changes share several features. All were born in the midst of fiscal crisis or quickly subverted to address declining revenues. The plummeting price of North Slope crude oil hastened restructuring in Alaska while the national recession of the early nineties supported reorganization elsewhere. Not surprisingly, all of the changes were politically complex and often pitted bargaining units, institutions and communities against whoever was perceived to be leading the change. Finally, with the exception of North Dakota, none of these changes achieved quickly either the cost savings or the educational improvements that their champions promoted.

THE NEW AUTONOMY

The second trend, that of returning authority to local campuses and their boards, has been more discussed than realized. Michigan, which represents something close to a free market system for public higher education, remains the ideal for academic libertarians. Illinois made very modest steps in this direction by dropping two governing boards, yet the state retained its powerful and, by most accounts, effective coordinating board. The most dramatic change occurred in New Jersey in 1994 where Governor Christine Todd Whitman eliminated a powerful coordinating board and shifted much of its authority to local campus trustees. In 1992, Maryland exempted two of its public institutions from the new system. Morgan State and St. Mary's College were to be governed by their own boards of trustees. Because of its unique agreement with the state to achieve specified access and quality goals in return for greater freedom to manage its own affairs, St. Mary's represents a charter college.

The example of New Jersey and St. Mary's College suggest that the new autonomy leads to generally positive results with respect to academic quality, access, and efficient management. Cost reductions in these cases, as in Michigan, remain elusive. While faculty supported or acquiesced in the changes in Illinois, faculty unions (along with the NAACP) resisted the change in New Jersey. Collective bargaining with faculty in the Garden State remains a statewide not an institutional function. While it is too early to conclude that these competitive models will consistently prove superior to the highly regulated alternative, the preliminary results are promising.

It is worth noting that a hybrid of both the oligarchic and autonomous patterns has emerged here and there across the country. Often endorsed by activist trustees, this approach combines a faith in the virtues of decentralized decision making with insistence on setting policy in areas such as affirmative action, remedial education, admissions and the make up of the core curriculum.

WHAT NEXT?

With state surpluses contributing to healthy higher education appropriations and the absence of highly visible benefits from the more restrictive approaches to governance change, there are likely to be fewer examples of dramatic restructuring in the foreseeable future. However, modest devolution of authority in administrative and managerial areas from state bureaucracies to systems and from systems to institutions is becoming widespread. Thus state departments of finance and personnel are granting greater discretion to system administrations. Campuses in several states are acquiring more latitude in setting tuition and contracting for services. One rationale for these changes is to allow conventional public institutions to compete with the rapidly growing for profit sector described below.

A more pervasive force for change in higher education generally and on the professorate in particular comes not initially from state legislators or trustees, but from the new market place for higher education. Three complementary trends merit attention. A growing list of for profit institutions -- the University of Phoenix, Keller Graduate School, Jones International University, Harcourt Brace, to name only a few of the more well known -- will not only serve students who might have attended traditional institutions, but represent a new and efficient model of delivering education. Without such expensive trappings as tenure, expectations for research and community service, these institutions often hire working professionals to teach on a part-time basis. A few specialized faculty develop a standard curriculum which is distributed nationally or around the globe.

Coupled with this new pattern of academic organization -- profit oriented, national and international in scope, employing specialized instructors and curriculum developers, in place of a conventional faculty -- are new patterns of electronic distribution which defy traditional geographic and political boundaries. The Internet, for example, opens the door to worldwide distribution of course and degree material. In this free flowing environment, state regulatory control becomes a formality.

Finally, a cultural change, in which the international market place replaces the cold war as the dominant social as well as economic reality, affects colleges and universities just as it does every other social organization. Much has, and will continue to be, written on this topic, but suffice it to say here that this groundswell works to shift the ideal of a community of scholars to a series of vendor-consumer relationships. In this environment, power shifts from the professor to the student-consumer and from the conventional academic institution to lean, fast moving and efficient educational marketing enterprises. What keeps a state legislature in this New World from offering the contract for higher education services to one or more of these new market-responsive vendors?

The presence of these new providers offering programs in both traditional and electronic formats in a market where almost everything is for sale will combine to increase the pressure on faculty tenure, on the role of the professor with complex educational, research and service responsibilities, on preference for

full-time as opposed to adjunct appointments, and on conventional notions of rights to intellectual property.

SUMMARY

Dramatic governance restructuring, at least on a par with some of the changes in the late 1980's and the early part of this decade, is apt to be held in abeyance so long as the economy remains strong. A predisposition for decentralizing some management authority and a generally more favorable view of the benefits of free market competition will lead to modest increases in autonomy in many states. The most potent force for change in the future, however, and one with the greatest potential impact on the professorate, is the rise of profit-oriented academic institutions vending their services on a national and worldwide scale.

II. MERIT AND ACCOUNTABILITY IN HIGHER EDUCATION

A. Report Cards: To Reward or Punish?

B. Three Dimensions of Accountability

C. Collective Bargaining and Accountability in Higher Education: The Coming Transformation of Higher Education and the Place of Faculty

MERIT AND ACCOUNTABILITY IN HIGHER EDUCATION

A. REPORT CARDS: TO REWARD OR PUNISH?

Mary Burgan, General Secretary
American Association of University Professors

It is not surprising that when academics talk about accountability, they should automatically refer to grading. Their professional lives turn upon judging, constantly deciding what research is worth following, to what degree a student has understood a concept well enough to move to the next one, where a policy decision will ultimately lead. We are used to giving grades. Thus, in a time of emphasis on accountability and efficiency, we talk about report cards for academia.

Of course, the notion of grading implies other notions: that all activities are measurable, that there are instruments subtle enough for fair appraisal, that all activities can benefit from the application of critical judgments. Why this emphasis on grading? I am reminded of my sister's experience during her first two years of medical school at the University of West Virginia more than forty years ago. Our state university had only two years of medicine and so was intent upon proving itself worthy. One way was to test and grade as rigorously as possible. Her two years under this system were a nightmare, but my sister came through with flying colors, leaving for her last two years on a fellowship to the University of Pennsylvania. That august school had no need to prove itself, and so its testing was kindly and its grading magnanimous. Her last two years of medical school were demanding but not full of impossibly high hurdles. Such diametrically opposed instances of grading pose the question we should be asking when we indulge ourselves in an orgy of assessment: "What are grades for?" Penn seems to have considered that they are to reward excellent work. The other school seems to have countered that they are to punish slackers. In this latter mode, a projection of institutional identity and pride onto the currency of grades announces: "The world is divided into winners and losers. Lest we be mistaken for losers, we will identify failure ahead of time," and issue report cards more frequently.

If higher education is not a house of correction, it has become a house of judgment. Faculty members write to AAUP's national office to complain about the overlay of ever more onerous instruments of surveillance. The California State faculty find themselves trying to cope with "Pissies," or PSSI's , an ever-growing

inventory of "performance indicators." There has been such an administrative imperative to second-guess tenure that post-tenure review has been posited as a universal necessity. In response, the AAUP has codified the conditions under which post-tenure review would be an empowering exercise of collegiality rather than a further exercise in badgering tenured faculty from on high. Course achievements have long been measured by teaching evaluations, which are almost universal by now (and almost universally blown off by students, I'm afraid). But these are not enough. To take their place, there has come to be an emphasis on "outcomes." But since outcomes are so hard to measure, those who want to short-cut education are apt to emphasize any kind of certification as an "outcome." Thus while some students are rigorously tested for what they've learned in college, others are assured that they can get easy certificates for what they've learned in life. It doesn't matter how a student got the degree, so long as there is a diploma. I obtained a delightfully quantified example of this from an Amtrak travel magazine on my recent trip to New York: there are several ads for college degrees, but one especially caught my eye: "Ph.D's $179, M.A.'s $139.75, B.A.'s $99.75." Money is, after all, the final counter for merit.

The Amtrak ad reflects the truth that in a very commercial culture, everything had its price, and price is a kind of easy grade. Indeed, the most powerful report card in higher education is the one issued every year by the *U.S. News & World Report* on the status ranking of American Colleges and Universities. That report has established the national ranking game as one of the main engines of change in our whole system. Everyone wants to be in the top ten or twenty—or the top half, at least. All grades must be above average. And it doesn't matter what the basis for the grade might be. Membership in the AAU. Value of research grants. Library size. Or who got into the NCAA tournament and how long they lasted there. Once, a number of years ago, the University of Wisconsin alumni magazine ran an article on all the top tens the University could brag about. The capstone was that the President of Wisconsin, Donna Shalala, was deemed to be one of the top ten women executives in the country! Institutional bragging might seem a minor evil—until one considers the amount of money a President or Board is willing to divert from the educational program to assure a winning football team! Or to lure a Nobel Prize winner onto campus.

Bragging is, perhaps, a normal response to grades. But so are threats. In recent years, we have seen more vinegar than honey applied to the test results in higher education. In the state of New York, especially, threats have abounded. There is the threat of withdrawal of funding if state or city or board mandated changes don't occur. There is the threat of takeover of the institution. One of the current threats at SUNY combines a withholding of money for remedial courses and the Board's creation of a core curriculum—all because of a perception that the university has somehow or another become "degraded." Then there is the threat of outsourcing the work of a university campus to competitors in order to heighten the sense that the highest score (in this case profit) wins. It is interesting to me that in the outsourcing strategy, all grading seems to cease once the contract has been signed. A hotel chain can come into a campus, replace the cafeteria line in the student union with pizza vending, casualize long-term workers, and raise

prices, but no one ever seems to reflect on whether or not it has all been worth it. The value of the corporate model is self-evident, it seems.

Finally, the ultimate threat of the managerial urge for report cards is that it masks an urge to take control of the work done by the faculty. One popular idea is to turn that work over to computers. Teaching can be managed by technology if we "unbundle" it so that it can be shared by two or three part-time individuals who will do as they're told. "Unbundling" is a current watchword in management literature, and especially in the discourse of those who would do for education what they've already done for the student union—take it all apart and put it back together in a corporate model. And that model would promise, in the words of a recent dictum, to provide "the standards that are necessary to prepare young people for an ambitious, high quality higher education." Such dicta envision "clear, objective standards of achievement," and although they maintain that they rely on set examinations to deliver the verdict, the truth is that success is predetermined by the ideology of the examiner. In these days that ideology is resolutely vocational.

Of course, none of us is against a common sense estimation of the results of our work. It would be folly to hold the view that what higher education does can never be tested. And, although it is an unacknowledged truth about us, we cannot take refuge in the fact that American higher education *has* been tested in the market place, and the whole world has concluded that it turns out an excellent product. Instead of resting on our laurels, however, we must be hardheaded. We must look at the implications of mindless grading embedded in our enterprise, fighting off its pernicious effects.

What are the most pernicious results of the current report card craze? First, it tends to install another layer of managerial bureaucracy. Surveys require surveyors—and the increase in administrative staff increasingly signifies an increase in officials who spend their time trying to quantify outcomes. Secondly, the grading craze requires an inordinate amount of faculty time reporting. Information must be gathered and quantified, claims must be made and substantiated, before any activity can proceed. Thus faculty find themselves wasting time in gathering evidence to document the ineffable procedures of their teaching and inquiry, knowing that nothing gets rewarded that cannot make a quantifiable case for itself. Involved in this waste is another problem that grading systematically installs in our reward system: the fallacy of misplaced concreteness. By the very act of rewarding and punishing, we enshrine those values that we may not wish to foster. If you reward what you can count, you may end up rewarding only what you can count, leaving out values that you wish to foster. In his classic management article, *"On the Folly of Rewarding A, While Hoping for B,"* Steven Kerr has cited the university's reward system as a prime example of this folly.[1] But the most harmful effect of the report card mentality is the conviction that all failure can be fixed through blaming individuals and then eliminating them. Under this mono-causal view, that all evil is caused by "dead wood," there has been the replacement of a stable, committed and long-term work force with an anxious, sardonic and unconnected labor force. This part-time tier of labor, under

perpetual threat of non-reappointment, can be easier to control than tenured faculty—though the efforts of part-time and adjunct faculty to organize hold promise to defeat that aim. Nevertheless, the most pernicious effect of all the "accountability" that has been foisted upon academe over the past several years is to reward the mechanical means of reproduction—standardized, regularized, and infinitely replaceable. When what we yearn for is a more human mode of operation, more humane results.

We believe, after all, that process over the long run may be more important than the short-term product. That is why we fight so hard for full-time, long-term employment in higher education. We fight for whole jobs rather than "tasking." And that is why we faculty need to take the occasion to reform our own grading systems, even as we resist new ones. I conclude by listing three prime areas for reviewing our own grading system right now.

First, in the recent decade of an abysmal academic job market, our tenure and promotion standards have come under heavy fire for being rigid, biased, and unrealistic. This is one system of grading that the faculty controls and it should take such criticism seriously because irrational reward systems undermine the critical notion of peer review. When we assess ourselves, we must do it wisely. Second, the faculty also tends to control course assignments and workloads, another area in which our junior colleagues criticize our standards. I believe that the faculty must become more flexible in permitting variations in course and workload. I think that individuals should be able to "count" service as part of their loads, for example. Too often we ourselves demand conventional definitions of research and teaching at the expense of the less concrete work of service to our institutions. Sometimes we may see the virtue of varying assignments according to life situations, but our own grading systems may interfere. Third, we need to make sure that we don't become slack in offering our own careful review of our colleagues when necessary. It may be that we overdo reviews of new faculty, but we neglect part-time and adjunct faculty members, who rarely receive collegial feedback. Rather than leaving them in the anonymity of the outsiders, we should offer mentorship, and sympathetic critique to all of our colleagues.

Finally, the reforms I am suggesting will require a return, individually and collectively, to academic citizenship for all faculty members. We are being tested, and unless we are active in our departments, colleges, and faculty senates, we will flunk. We will find ourselves governed by rules and examined by means that are repugnant to us. The final grade is not in yet, but I believe we'll have to pull an overnight to pass.

But then I've always told my classes that it's never too late to ace the course!

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[1] Kerr, Steven. "An Academy Classic: On the folly of rewarding A, while hoping for B," Academy of Management Executive, " 1995 Vol.9 No. 1, 7-18.

MERIT AND ACCOUNTABILITY IN HIGHER EDUCATION

B. THREE DIMENSIONS OF ACCOUNTABILITY

Judith S. Eaton, President
Council for Higher Education Accreditation

This paper will briefly highlight three dimension of accountability: the current environment of accountability, specific demands on higher education, and faculty and accountability through a national perspective which I have gained from working daily at the intersection of higher education institutions, the accrediting community and the public.

My goal is to describe some features of the current dimensions of accountability and urge that, while not always agreeable to many, accountability requires our attention. If we are appropriately attentive, we may be in a position to positively influence its emerging shape and impact.

CURRENT ENVIRONMENT OF ACCOUNTABILITY

Two features define the current accountability environment: the evolving social contract between higher education and society and the expanding influence of the market on the activities of higher education.

With regard to the evolving social contract, society still valves higher education (an older feature of the social contract), but distrust, anxiety and impatience about higher education are high (a newer feature). This change, in turn, is putting pressure on higher education to demonstrate and document its commitment to accountability:

- Higher education, a visible, public institution, is subject to the same distrust visited on similar institutions such as government and the press. If higher education was ever viewed as an automatic good (as some believe), this is no longer the case: its worth must now be demonstrated.

- Higher education appears more important than ever to social and economic mobility: some type of higher education credential is perceived as essential to more and more jobs. At the same time, the public sees higher education less available than in the past because of the increased price in relation to income.

- At least some opinion leaders continue to express impatience about the slow pace of change in higher education, arguing that we are the last major industry in the country to change. This is especially a factor with online education (electronically-delivered instruction and services).

The role of the market is more prominent in higher education now than in the past. We are experiencing a "commercialization" of higher education characterized by:

- Higher education treated as a commodity and not an experience;
- Higher education viewed as retail sales- selling, not sharing, learning expected;
- The student expected to behave like a customer, not a learning partner.

This commercialization is not just happening to us; we are helping to bring this about. We talk about "selling prestige," "medallion institution," "ATM education." We poll, advertise, and rank. We discount and bargain over tuition, offering credit, prepayments and loans. Some find this commercialization acceptable; other are perturbed by its implications for our history of distance from the market.

We are also experiencing more external competition, as more and more for-profit higher education institutions as well as virtual universities and corporate universities offer higher education program and services. Traditional site-based, non-profit institutions are used to competition with each other, but they are not as accustomed to the competition from these other sources.

THE ACCOUNTABILITY DEMANDS

In this current environment, accountability demands are coming from the federal government, the states and the public. The demands are focused on three areas: institutions, students and the future.

The focus on institutions takes the form of demands for evidence of institutional accomplishment. It is no longer enough to request resources for college and universities based on reputation or assumed valve. Both government and the public are calling for

- Evidence of quality, especially
  - student learning: what are the gains and achievements?
  - impact of research: how are research efforts producing results for students and society?
  - accomplishment of public service: what contributions are colleges and universities making the quality of society?
- Evidence of efficiency, especially
  - return on investment of public money: how well are state institutional aid and federal student financial aid being used?

- use of private money: are tuition increases justifiable or can institutions enhance efficiency?

The focus on students is tied to demands that graduates demonstrate that their collegiate education yields skills of individual and social valve. Employers seek competence on the job. Communities seek competent and invested citizens.

The focus on the future is directed to the capacity of higher education to make good use of technology, especially in the form of online learning.

FACULTY AND ACCOUNTABILITY

The current environment of accountability demands translates into specific expectations for faculty. Whether we are in accord with this or not, faculty are expected to provide

- More attention to teaching and student learning gains-accountability is about evidence of student skills

- More public communication-accountability is about audiences other than ourselves.

- More energetic reflection on potential of technology for teaching and learning accountability is about addressing, for example, online learning and competition from for-profit providers.

These expectations-emerging from the current environment of accountability and current accountability demands-will, at the very least, force us to reflect on that which we have taken for granted about the traditional faculty role: the rich opportunity for engagement with students, the benefit of participation in an intellectual community and the excitement of intellectual entrepreneurship. If we wish to preserve these features of faculty life in the face of these accountability dimensions, what do we need to do?

CONCLUSION

Accountability in higher education is not new, but it is changing. It is influenced by an environment characterized simultaneously by limited confidence in higher education and expanded need for it, an environment in which higher education is increasingly commercialized, and an environment in which faculty are being pressured to respond to provide evidence of effectiveness and quality.

As I see it, we have three choices. We can ignore these dimensions of accountability, submit to them, or attempt to shape them. For the benefit of our enterprise, our students and ourselves- I hope that we chose the last alternative. Without our influence, the dimensions of accountability will shape us. We may not like the result.

MERIT AND ACCOUNTABILITY IN HIGHER EDUCATION

C. COLLECTIVE BARGAINING AND ACCOUNTABILITY IN HIGHER EDUCATION: THE COMING TRANSFORMATION OF HIGHER EDUCATION AND THE PLACE OF FACULTY

Frank Newman, President
Education Commission of the States

Higher education, that most stable of society's institutions, is now in a period of change and transformation that is likely to have a profound impact on the employment conditions of faculty. Like most fundamental changes, the transformation is moving slower than its advocates think should be the case, but faster than most of us realize. And, like most fundamental changes, there is both opportunity and danger ahead. It is important for those in higher education to think carefully about what is happening and to plan for the future rather than just drift into new arrangements. Only this way can we maximize the benefits from the changes underway and minimize the disadvantages.

The transformation is being driven by the convergence of a number of forces. First of all, there is a growing concern and frustration among political leaders about the lack of response by the institutions of higher education on a number of critical issues. These include cost and productivity (the issue which has driven health care reform), the assurance of quality (raised increasingly by employers) and the failure to connect to the massive effort at reform of elementary and secondary education (particularly, but not solely, concerns over teacher quality and consequently teacher education and professional development.) There is, as a result, a growing demand for greater accountability. This demand, we should recognize, is part of a demand for accountability now seen across all public institutions.

Secondly, there are a set of new forces that are bringing change in their own right. One of these is the changing demographics facing higher education. There is a widespread sense within the political world that more of the American population needs a postsecondary education in order to participate effectively in the work force. The President argues that we need to expand educational opportunity until we reach at least 80% of each age group entering some form of postsecondary education (as opposed to the approximately 50% today). In many states, even without such an expansion, access is a problem. In states with high

growth rates such as Florida, Colorado, Arizona, California, Texas or Utah, even the current rates of college going will strain the higher education system. Yet political leaders are unwilling to build new or expand existing campuses as happened in the 1950's, '60's and 70's. Because of the high cost of creating new campuses and because of the skepticism about cost and productivity noted above, they are searching for ways to achieve greater access that do not call for simply adding on to what they see as an inefficient system.

Another new force is the growing number of new providers in higher education. This includes for-profit colleges and universities, new non-profit consortia, traditional colleges and universities moving away from their current geographic limits and beginning to operate across the country (or even across the world), for-profit firms franchising programs from traditional universities and colleges (including some of the best known, such as Duke, John Hopkins or the University of Chicago.) There are far more of these new providers that are generally recognized and their numbers and impact are growing steadily. The force of their competition is breaking down the old system by which states have run higher education — basically a cartel system. Public institutions currently enroll about 80% of the students. States tend to create, fund, regulate and protect these institutions and assign to them specific roles. The rash of new competition is shifting the system from a cartel arrangement toward much more of an open market.

The last new force is the power of technology. We see its impact in the rapid growth of virtual courses. Some of these are provided by the new for-profit firms, most are provided by traditional universities adding virtual courses to their offerings and beginning to expand their catchment area. In addition we have seen a raft of new, non-profit and publicly supported consortia — Western Governor's University, the Southern Regional Electronic Campus, the National Community College Electronic Consortium, etc. But virtual coursework is only part of the story. Computers are just beginning to enter the classroom and in more and more cases to offer fundamentally different ways of organizing and managing coursework.

Political leaders, supported by business leaders, frustrated by the response to the issues noted above, see market forces as a means of bringing change and responsiveness to higher education. But such change and the idea of market forces brings both promise and danger. For one thing, market forces are better at serving individual needs then they are at broader, societal needs. Market forces generally have little interest in such issues as social mobility and equity, cultural development or the provision of civic glue which is so important in the role of the university.

First a word about the transformation underway and then about the issue of accountability. If we think back on the origins of the American college and subsequently the American university, we will recollect the traditions borrowed from the Oxford-Cambridge model. There were five basic concepts that

undergirded the American college from the start, concepts that were borrowed directly from our British forebearers.

- scarce faculty collected together to lead the learning
- a library as the central learning resource
- a selective student body chosen on the basis of the student's anticipated role in society
- the campus as the place of learning
- the classroom where learning takes place primarily through face-to-face contact with the faculty member

In the Oxford-Cambridge model these are still in very much evidence today. The campus, for example, for almost all Oxford and Cambridge colleges is still a walled enclosure designed to keep the students in and society out.

But over the long history of American higher education, each of these principals has been steadily broadened and democratized as society's needs for higher education changed. Still, despite the fact that each underwent considerable change, each of these concepts remains in place in most institutions today.

Now, however, the new forces described above are challenging each of these assumptions. If one looks at them carefully, one can see that the new concepts by which some of the new providers are operating no longer require these five pillars. In fact, there are now a growing number of learning opportunities where not one of these assumptions applies.

Our society is one in which change takes place rapidly. The changes in higher education are now taking place rapidly. We are moving steadily toward a higher education system that is:

- more market-oriented
- more performance-oriented
- more learner focused

The implications for the role of faculty are enormous. Let me mention only four.

1. Course preparation

In the traditional university and college, it is the individual faculty member that prepares a particular course. Often the faculty member is the one who dreams up the idea of having the course in the first place, then shepherds it through the appropriate committees, creates the syllabus, pulls together the materials, delivers the course, determines whether it has been successful and decides whether to give it again. Among a number of the new suppliers the process is quite different. The Open University in Britain, which is now by far their largest and one of the most successful institutions, has pioneered a quite different approach. A team, centrally selected, addresses the development of a

new curriculum and a set of courses. The team exams the issue of pedagogy and determines which style of learning would be most appropriate, prepares the course materials and then continuously evaluates the success of the course. The success of each student is measured not only by success in a particular course but is tracked throughout the student's full experience at the institution. The success of each lecturer teaching the course is also measured.

The traditional mode requires low investment initially but has high operating costs. The Open University model has a high investment initially but, wherever there is large volume, has a low operating cost and often produces quite different results. This model has now been adopted by several of the new providers in the United States including the University of Phoenix. The Open University itself has begun franchising its approach in this country having begun with two arrangements, one with the Western Governor's University and one with the California Virtual University.

Within these new suppliers, the role of the faculty member and the freedom to create whatever courses one wishes in whatever way one wishes, using whatever pedagogy one chooses, is gone.

2. The role of adjuncts

There has been a growing debate across American higher education about the expanding role of adjunct faculty. Many institutions have let the numbers of these temporary teachers drift upward, both as a means of cost saving and in an attempt to gain greater flexibility. This has led to a debate as to whether or not this undercuts fundamental roles of the institutions.

Many of the new suppliers do not just use adjuncts as partial substitutes for traditional tenure-track faculty. Rather, they see adjuncts as the basic providers of their service. In 1997, for example, the University of Phoenix had 45 full-time faculty (primarily engaged in the course development effort noted above) and 4,500 adjuncts, or a ratio of one to 100. In short, at the University of Phoenix, the adjunct IS the faculty.

3. High volume courses

There are a number of areas within higher education where the same course or set of courses is given over and over. The most obvious cases are remedial work and introductory courses. For both of these cases, these are among the least popular courses to teach and often among the least well taught. Using the team approach noted above, it is possible to create very different results.

For example, at Virginia Tech, when the institution was faced with increasing enrollments and decreasing budgets, they created an entirely new center for introductory math courses. A nearby store front was converted into a learning center which students can use fourteen hours a day and seven days a week. The student sits at a table equipped with computer terminals, and works with

on-line course materials. The student works through the course and the computer tracks the students progress. Whenever the student is confused or stuck, he or she places a paper cup on the top of the computer and an instructor comes over right away to help out. Whenever a number of students are stuck, the instructor pulls the students together in a seminar room and goes through the materials.

A number of points are important here in terms of the faculty role. First, such a project requires a team approach not an individual faculty course preparation. Second, there is considerable up-front investment, not only in equipment but particularly in the software and in the training of the faculty. Third, faculty have to take shifts in order to cover the seven days. Fourth, no one faculty member is responsible for an individual set of students. And finally, once the system is in place and the initial investment costs completed, not only are the costs lower but the results are better.

This last point has a lot to do with the application of more thoughtful pedagogy. Introductory math courses have always been a place where the majority of students have a hard time grasping the abstract concepts that have been put forward, most often by the lecture method. When the pedagogy is carefully structured and courseware is developed that builds on the capacity of students to see problems in their more practical rather than abstract sense, improved results occur.

Suppose one were to take another area where this could be even more important — remedial education. After all, the reason students are in remedial education is they didn't get it the way it was typically taught the first time. Suppose one were to take a hypothetical university that faced a major concern on the part of its political sponsors as to the number and cost of its remedial offerings. Suppose that university were to propose an investment in new software and teaching approaches that would allow substantial improvement in results and an ultimate reduction in cost. Suppose the university further offered to first perfect the approach and then begin to transfer it to the community colleges and the high schools. Might this not make considerable sense to the public?

4. Assessment of learning

A characteristic of the changes going on is the interest in a more effective assessment of student learning. Not only is this an issue with political leaders and employers but many of the new providers have created effective systems of assessing student learning in order to demonstrate that their quality is indeed equal to, or better than, traditional institutions. All of this is likely to increase the demand for new forms of assessment and perhaps even forms that are administered by a body that is external to the university, much as has happened in elementary and secondary education. Here again, this fundamentally alters the role of the faculty.

In addition to these four specific changes in the faculty role there are some overall changes that could make the university a more bumptious place to be. For one thing, the nature of the competition from the new providers tends to be quite focused on certain populations and courses. As one can easily imagine, the University of Phoenix, the Open University, Western Governor's University, Sylvan Learning, the Southern Regional Electronic Campus and the other new suppliers are focused on the older, working students, and particularly those in high volume courses such as business. They do not attempt to provide all of the traditional services that a university does but rather focus on providing more effective service for that older, working student (for example, the issues that older working students named more than any other are two: parking and peer group formation.) To compete, it may be necessary for universities to unbundle some of their services. In other words, the university might find it necessary to compete by having a more focused effort aimed at the older, working student taking a course such as business, but separating the university's scholarship, service to the community, faculty committee work, service to the discipline, etc. If universities must justify the return on investment for the non-teaching activities, are they prepared to make the case?

Another overall change that has been little noticed is that some fields of study have already moved outside of the higher education system without our even noticing it. The most obvious example of this is the widespread training going on to develop skills in the information technology field. A number of companies — Microsoft, Novell, IBM, SYSCO, Oracle, have developed large, multi-hundred million dollar businesses training people in this arena. Universities have noticed this only as relatively low course enrollments in such programs as a Master in Computer Science, a surprising development at a time of extraordinarily high demand for such skills. Today, in fact, for most employers, a Novell or Microsoft certificate is more valuable than a masters, even from a well known university. Since there are so many students seeking entrance to higher education, we have not noticed the loss of potential students in this important area. But in the long run, this could be an important risk to the health and well-being of faculty members.

So, my argument is that higher education is in the midst of profound changes. For a while many parts of the higher education system will feel little connected to these changes but eventually, certainly in no more than a decade, these changes will eventually effect all of higher education. It will change to whom and how we teach, and how institutions are financed and governed.

What is the implication of this for accountability and how might it effect collective bargaining? Perhaps the place to start is to ask accountability to whom and for what? Traditionally, I suspect most faculty members feel they are responsible to their department for carrying out their obligations on campus and to their discipline for being an effective and engaged scholar. The political world is asking for a different kind of accountability, more of an accountability to the public. One can see the effects of this at the elementary and secondary

level. As a result of strong action by governors and legislators, essentially every state now has standards for learning at the school level, along with the assessment of learning against those standards and the reporting of the results to the public. More and more states are adding formal modes of accountability as well. In negative cases the state often calls for reconstitution of the failing school. When there are positive results, the state often provides financial incentives. One might keep in mind that in some dimensions the problems are more difficult in higher education. For example, the drop-out rate in postsecondary education is higher than it is in secondary education. Some other indicators of student interest and competence are equally concerning. A crucial question in how institutions respond will be whether the unions are seen as the opponents of reform, as they often were early in the reform efforts in elementary and secondary, or will they be seen as the agents of helping to improve the accountability of the higher education system?

Political leaders are also fixated on the idea of achieving some new degree of accountability in higher education through the use of market forces. As the new suppliers create competitive pressures, will this help force the institutions to become more learner centered, more focused on teaching, more able to produce documentation that students are actually mastering the skills that are needed, skills that in the past were only assumed, never measured. There has been little attempt to measure the outcome of student experiences in higher education, but what evidence there is, is not totally reassuring. The work of Howard Gardner and others has raised serious questions about how much students master mathematics and science. Employers have regularly complained about the lack of other skills, particularly the capacity to write. Are we likely to see a growing pressure for the kind of standards and assessment that has taken place at elementary and secondary education?

A place where all of this is likely to be put to the test soon is in teacher education and the professional development of teachers. There is already a demand on the part of political leaders for the testing of teacher education graduates. The results here as well have been disturbing. Now, three different for-profit suppliers have indicated that they are going to create new programs to provide teacher education and professional development across the country. Will this new market force provide the kind of accountability for which political leaders are searching?

To my mind, the most important form of accountability should be accountability to the students. The for-profit concerns and many of the new non-profit consortia have made clear that they see this as their paramount responsibility. They talk continuously about being learner centered and learner focused. The assessment that they are doing is aimed at insuring that students leave their programs, whether they be virtual or on site, after having reached the necessary and pre-identified levels of skill. In other words, they are arguing for outcome measures rather than seat time.

What is the down-side to all of this? First of all, as noted, society might see an erosion of key attributes that have long characterized American higher education. Are the new suppliers, particularly the for-profit institutions, interested in the questions of assuring social mobility and equity to all parts of the population or will they be only interested in skimming those students who have the skills and the money to participate successfully in their courses? Will the new suppliers be concerned about service to the community? Will they be concerned about the application of research knowledge to the problems of the society? In order to compete, will the traditional universities begin to set aside these important roles?

As the new providers become more prominent and gain the attention and support of policymakers and the public, there is a danger that they could siphon off more than students. If political leaders and the public see the new suppliers doing a better job in teacher education or in handling older, working students (who now represent more than half of all the students enrolled in higher education) will they siphon off public support as well?

There is a danger that the change in faculty roles could undercut the traditional idea of the faculty member as a mentor and advisor to the student. Good faculty members advise students on a wide range of subjects far beyond the particular nature of the course that the student is taking. The evidence as to the results of virtual courses is still unclear. In general it appears that students taking virtual courses seem to have more contact with the faculty rather than less. But is this contact of the same quality? Does it go beyond the nature of the course?

Many of these changes encourage a growing attention to focused and pragmatic course activity. Is there a danger that we will lose the joy of exploration and the excitement of learning for its own sake? Is there a danger that we will lose the fundamental concept of a liberal education? To some degree universities are vulnerable because the gradual drift on campus has been to lose some of these attributes already. For many students, leaving aside only the remarkable few, the typical course fails to provide the excitement of learning that faculty members love to champion

To return to my original point, change is coming and that change carries within it the opportunity for both gains and losses. Surely, many of the issues that collective bargaining has focused on in the past — terms of employment, the role of the faculty member, the self-direction by faculty, faculty participation in the governance of the institution — will be undergoing considerable change. Can this become a positive experience or is it destined to be a period in which we drift into controversy and the sort of change that undercuts many of the things we value.

III. ACADEMIC FREEDOM

A. Academic Freedom and Politics

B. Two Paradoxes for Academic Freedom

C. Stopping SLAPP Suits: A Proposal

ACADEMIC FREEDOM

A. ACADEMIC FREEDOM AND POLITICS

Roger W. Bowen, President
SUNY, New Paltz

To rephrase the old saw, "No one is ever opposed to academic freedom; unless it is the academic freedom of others."

The events transpiring between November 1997 and March 1998 at the State University of New York at New Paltz lend meaning to this observation.

On 1 November 1997, the Women's Studies Department of New Paltz held its 21st annual conference. The theme of the conference, Revolting Behavior: The Challenges to Women's Sexual Freedom, was intentionally playful, that is, it was intended to tease those with Victorian sensibilities on the issue of sexual freedom for women. The conference included among its 20+ panels several sessions that pushed the proverbial envelope of good taste: one on safe and consensual sadomasochism, another on sex toys, and a third on how to get what you want in bed.

Panel presenters were selected by the Women Studies faculty at New Paltz on the basis of competitive submission of applications. Not every panel leader was a professional academic, but each could claim specialization and expertise in the subject matter in question.

Publicity generated prior to the conference attracted the attention of a good many officials including elected State representatives, SUNY trustees, and gubernatorially-appointed members of the New Paltz College Council. Several members of the latter group intervened early and asked me to exercise prior restraint, i.e., to censor certain panels (in most instances, the three mentioned above) on the mistaken assumption that my authority permitted me to act as a CEO or military general. I attempted to educate them about the particular limitations on a university president's authority over academic matters and offered them a friendly lecture on the meaning of academic freedom. I failed. In the end I could only make note of their protests and inform them that the conference would take place as advertised.

As the conference opened, sitting in the front row next to one another was New Criterion editor Roger Kimball, one SUNY trustee in the company of the SUNY Chancellor's wife, and a local gadfly who had a history of attacking the college. Elsewhere in the audience were two members of the College Council who had earlier expressed their displeasure with the conference theme.

It was Kimball writing on the op-ed page of the *Wall Street Journal* only days after the conference who fired the first shot in what became a very public controversy. Later the same day, the Governor denounced the conference as an improper use of taxpayer dollars; and nearly simultaneously three State assemblymen were publicly calling for my job. Privately at first, in communiques to her fellow SUNY trustees, the trustee who had attended the conference called for my removal as president; another trustee soon joined her in that call and then both went to the press with calls for my dismissal, all the while professing a commitment to academic freedom.

Reacting to the Governor's and trustees strong statements, the Chancellor appointed a five-person investigatory commission, which included two lawyers employed by the SUNY System administration, one former SUNY president, one current SUNY academic vice president, and the head of the SUNY Faculty Senate, to interview all relevant parties and to answer a series of questions, the thrust of which were whether I had acted improperly and whether tax dollars had improperly subsidized the conference.

The Chancellor's review commission's most important finding, so far as I was concerned, read: "The President's decision to allow the conference to proceed was based on the time-honored tradition of free expression of controversial subjects within higher education. It is the view of the Review Committee that...his judgment in not canceling the conference was correct, as distasteful as he anticipated some of the conference activity and content might become."

On the second major issue, taxpayer funding, the commission concluded: "...to permit the presence of public tax support to impose limitations on academic freedom would imperil at almost all post-secondary institutions the freedom to follow ideas to their conclusion and invite into the institution a wide range of perspectives for consideration and debate." And no less significant, "Taxpayer support is provided as a matter of public policy and cannot depend on the wishes of individual taxpayers or the disagreement of specific taxpayers with particular activities."

In brief, then, the commission's report reaffirmed the academic freedom of the faculty at our public institution to hold such controversial conferences, using tax support, and the president's obligation to defend this faculty right.

It was therefore somewhat perplexing, as I stated in a press release, to learn of the Chancellor's reaction to his own commission's findings. The Chancellor stated that I made "errors in judgment" and that I was remiss in not having "insisted on substance and rejected the simply prurient and sensational." About

the content of the conference, something that the commission did not directly address, the Chancellor stated that "There is no place on a University campus for displays that are devoid of intellectual, social or academic merit" and wrongly accused the conference of having "promulgated a 'how to do it' manual on lesbianism and sadomasochism."

My press release in response pointed out that the Chancellor had ignored the findings of his own commission and had allowed "politics to intrude in the affairs of the academy."

Neither I nor the Chancellor attended the conference, nor did any of the Chancellor's staff, and, without offering comment on the academic content of the 20+ panels, the review commission made quite clear that the "uses of sexual language, allegedly simulated sexual acts [references to a post-conference program], and literature distributed with descriptions of sexual practices and other sexual material would most likely not be able to meet the criterion [sic] of lacking serious, literary, artistic, political or scientific value", the criteria for determining whether obscenity laws were violated, as was alleged by the one SUNY trustee who attended the Conference.

SUNY New Paltz does not rely on its deans and vice president of academic affairs to police its faculty activities and scrutinize their content. We trust our faculty, our trained academic experts, which in the case of Women's Studies includes several distinguished published scholars and many fine teachers. Trust is the way of the academy and is based on the principle and the practice of academic freedom. Critics of the conference, however, see this working relationship of trust as a wanton abdication by university administrators of their responsibility to set standards, assure responsible behavior, and prevent academic freedom from becoming academic license.

Politics--meaning, here, the ownership of power and how power is used--did [emphasis added] intrude into the affairs of the academy in this instance. The Chancellor was in a very difficult position--he had to listen to his angry trustees, the Governor, and elected officials, while at the same time defend academic freedom. His solution ultimately was Solomonic and therefore unsatisfactory to both the critics and the defenders of the conference. He gave the critics the public rebuke of me that they probably wanted but did not go the entire distance and fire me. He let me keep my job, but the public rebuke of me, with mention of a performance review to follow, sent a chilling reminder to all SUNY presidents that the prudent course in the future would be to place limits on the academic freedom of the faculty.

Of course, politics will continue to shape how the academy operates in the future. The cultural wars that have the conservative extremists on the warpath against women's studies, black studies, and other less traditional disciplines have not ended; the practice of political appointment of trustees is not likely to end either; and the academy in all its insular and self-justifying behavior before a

public tiring of our peculiar and expensive habits will likely continue to periodically attract some public criticism.

We need not only get used to such intrusions, but we must also prevent them whenever possible by doing a better job of educating our public critics and dealing creatively with them when controversies do occur. I wish the New Paltz Women's Studies brouhaha provided better lessons on such preventions and dealings. Alas, it probably does not, but it does provide a valuable clue about the cognitive gap that separates the thinking of members of the academy from that of some of its critics.

What the critics seem not to understand fully, and what members of the academy understand only too well, concerns the sociology of the purveyors of knowledge. The academy has always attracted people who are intellectually daring, who are rebels against convention, and who thrive in questioning orthodoxy. Such folk are applauded whenever, say in the sciences, their critical mindedness leads to new discoveries that advance the frontiers of health and technology, but in the social sciences and humanities the same irreverent temperament, especially when dealing with the subjects of sex, politics, or religion, is perceived by education's critics as a seditious challenge to prevailing mores, values, and conventions.

I understand this perception. My first exposure to seditious thinking came in my first semester in college, in an introductory English class, when members of the class read a poem out loud, one that was filled with grunts, groans, and similar sounds. I recall my professor's frustration over the class's failure to tell him the real message of the poem in plain, simple language. Finally, in exasperation, he blurted out its meaning: "Fucking is hard work!" This happened in 1965 when the "f" word had not yet become part of daily speech. I was shocked but impressed that profanity could so easily roll off my professor's tongue. Had my parents been there, I am certain they would have insisted I de-enroll from the class.

My professor was then, as are many today, an intellectual maverick--iconoclastic, rebellious, and intentionally provocative. (He also was a published poet of distinction.) Such a person is attracted to the academy for the freedom it affords someone of his disposition. Virtually no idea or no word is regarded as taboo; irreverence is something to be admired and practiced, and sensibilities of all sorts--shaped by religion, tradition, or family values--are fair game for questioning, probing, undermining, and turning over. Conservatives will no doubt be offended and would regard such approaches to teaching and learning as "excessive" and in "poor taste." Some, such as Roger Kimball, will write a jeremiad called Tenured Radicals and urge that the academy be cleansed of all such threats to morality. Others will try threading the needle and make a fine distinction between academic freedom and academic license. But most of us in the academy will recognize that the intellectual provocateurs constitute a distinct minority in academe yet we will nevertheless affirm that the academic freedom of the majority is only as secure as we make it for this radical minority. Frank discussions of homosexuality, socialism, and atheism may not be the stuff of polite

dinner conversation in Aunt Mildred's home, but in the academy they are the bread and butter of many serious thinkers.

A year has passed since "the troubles," as one Irish friend refers to the travails of last year. I still feel as if I am being watched: one of my College Council members, for instance, continues to denounce every real or imagined misstep I take; my faculty, seemingly empowered by what they perceive as a victory for academic freedom, now and then test the limits of the permissible; and some presidential colleagues refer to the new trustee-imposed presidential review system in SUNY as "the Bowen Review," especially that portion which invites public comment on presidential performance. And I continue to wonder whether the non-responses or very tardy responses from SUNY Central to various queries and requests I make, whether the glaring looks I get from some trustees and the no-looks from others, and whether the legislator who told me that a target has been painted on my back are a result of the conference. I tend to believe a senior SUNY administrator who confided, "You are the Chancellor's least favorite president."

At the risk of sounding self-justifying, in conclusion I must argue that the defense of academic freedom may very well exact a high price for some of its defenders, but the cost of rolling over would be even greater. Roll over and cultural warriors would not hesitate to cancel or censor events, programs, and curricula they dislike, and they would do so in the name of "higher standards." Nor would many hesitate to eliminate academic tenure--our strongest institutional support for academic freedom--in the name of "ending privilege" or some such notion. And some power-holders would not be averse to establishing ideological litmus tests in the hiring and firing of faculty and administrators.

Members of the academy have little or no political power, yet often we are answerable to those who have. What we do have in defending the academy against political intrusion is a frequently tested principle -- academic freedom and its constitutional cognate, free speech. If we all do not agree to defend it consistently and conscientiously, if we betray any backsliding or equivocation, we endanger the very soul of the academy: "The free search for truth and its free expression," in the words of the AAUP Statement of Principles on Academic Freedom and Tenure, and, more specifically, the freedoms of inquiry, of teaching and conducting research, and of questioning received wisdom. Upon all these freedoms, intellectual vitality depends; absent them, the academy is transmogrified into a learning factory where creativity is penalized and robotic behavior is rewarded. In such an environment thinkers will be free to think only what management dictates: teaching becomes mere instruction, learning becomes training, and thinking becomes rote memorization.

ACADEMIC FREEDOM

B. TWO PARADOXES FOR ACADEMIC FREEDOM

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I address two paradoxes for academic freedom today. The first is posed in an event that drew considerable public attention, the lawsuit brought by Beverly Enterprises against Dr. Kate Bronfenbrenner. It was seen, rightly, as an effort by a large, well-financed corporation to discredit, if not silence a social science researcher -- and so social science research -- that showed it in a very bad light. No doubt Professor Getman and Dr. Bronfenbrenner will speak to this event in detail; I will attend rather to the paradox the law poses for academic freedom.

The second is not posed by anything so dramatic as a potential courtroom confrontation. It lies rather in the rise of a radical strain of postmodernism (for lack of a better word) that has leached out of literary criticism into anthropology, history and law, even now to knock on the gates of Science.[1]

Inasmuch as this conference revolves about the role of faculty collective bargaining in higher education, I will have a little to say about the role of faculty unions in confronting both.

THE PARADOX OF DEFAMATION

David Rabban has recently pointed out that the profession's conception of academic freedom, rooted in the Enlightenment and elaborated in the AAUP's 1915 *Declaration of Principles*, rests upon a particular epistemology:[2] A belief that the truth, even if never fully attained, is nevertheless ascertainable, that knowledge can grow and advance; in sum, on a Progressive faith in the idea of Progress. If that is accurate, and it is, he questions whether academic freedom as we understand it, can survive in an academic world where radical advocates proclaim all truth to be subjective, where even the "facts" we rely upon are merely "socially constructed," where, as Thomas Haskell put it, we are given "a variety of incommensurable perspectives in criterionless competition."[3]

I will return to this question, but I wish first to focus on an aspect of the profession's theory of academic freedom that Rabban's epistemological emphasis assumes but does not discuss, our ethics. The scholar's immunity from hierarchical dictate, and even from a democracy's "overwhelming . . . concentrated public opinion," flows from the role of the university as an intellectual "experiment station where new ideas may germinate."[4] But *this* immunity cannot be absolute: "The liberty of the scholar within the university to set forth his [or her] conclusions, be they what they may, is conditioned by their being conclusions gained by a scholar's method . . .," said the 1915 *Declaration*.[5] This theme was elaborated by the late Edward Shils who, stressing academic freedom's extension to "intellectual originality," also emphasized that it was for a faculty to decide whether a colleague

> "...was being original, or divergent within reasonable limits, or eccentric to the point of mental incapacity, or impermissibly arbitrary, indolent, or otherwise irresponsible. Sanctions for their failure to conform with accepted intellectual standards could not be denounced on the grounds that they infringed on the right of academic freedom. . . .
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> * * *
>
> "the protection of academic freedom. Nor could they claim the protection of academic freedom for statements for which they had no evidence or which were flagrantly and arbitrarily contrary to the prevailing interpretation of the available evidence."[6]

As William Van Alstyne put it, "The price of an exceptional vocational freedom to speak the truth as one sees it, without penalty . . . is the cost of exceptional care in the representation of that 'truth,' a professional standard of care."[7]

Let me try to connect this to the Bronfenbrenner case: Beverly Enterprises claimed that Dr. Bronfenbrenner had made erroneous statements of fact that injured its reputation. It conceded at once that it was a "public figure" and that its complaint had accordingly to be measured by the constitution's standard adjusting the protection of reputation to the constitutional imperative of free speech. It maintained accordingly that its suit posed no threat to free speech; indeed, that once its demand for pre-trial discovery had been met, the record would demonstrate the validity of its claim under that standard.

The constitutional standard referred to was set out by the United States Supreme Court in the landmark case of *New York Times v. Sullivan*,[8] thirty-five years ago. The *Sullivan* suit was brought against the *Times* for having printed a political advertisement during the civil rights movement that asserted facts about the behavior of the Alabama police, under the supervision of the plaintiff, that, if false, held him up to public opprobrium. No more was required under Alabama law. A good deal more was required by the First Amendment.

The United States Supreme Court proceeded "against the background of a profound national commitment to the principle that debate on public issues should

be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks . . . ." The Court pointed out that, "That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" And it noted that the fear of damage awards can be as much of a deterrent to free speech as the threat of criminal prosecution. Importantly, the Court stressed that, " [T]he pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive. "

Consequently, the Court established that only those defamatory utterances that are published with knowledge of falsity or with reckless disregard of the truth are actionable. Moreover, contrary to common usage, willful or reckless disregard of the truth imposes no standard of care, it is not a test of negligence. As the Supreme Court later framed it:

> "[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."[9]

All this seems very protective of political speech -- and it is. Any fool can mount a soap box and lay all manner of invective on a public figure so long as the speaker had no reason to doubt the truth of what he or she said. This liberty is abetted by the Court's refusal to impose *any* obligation to investigate the facts before speaking. As Van Alstyne observed, "*Sullivan* grants a first amendment immunity to standards journalists themselves would regard as professional malpractice."[10] But what if the speaker is a serious social scientist who *has* investigated the facts? Would the theory of *Sullivan* not permit the plaintiff exhaustively to explore in pre-trial discovery -- by the required production of documents and by testimonial examination -- just what was before the speaker at the time he or she published the allegedly injurious words? The answer, given by the Supreme Court in *Herbert v. Lando*,[11] is an unequivocal "Yes": Editorial processes were not to be shielded from a potentially exhaustive judicial inquisition.

Consequently, Beverly Enterprises sought extensive disclosure of the data upon which Dr. Bronfenbrenner relied in speaking as she did; and it retained "experts" of its own to examine her research. All the while, Beverly claimed that in seeking to vindicate its reputation it was only assisting in a search for the truth: Just as a collegial inquiry into a researcher's methods would be justified by a claim of scientific fraud or misconduct, so, too, would a trial into the degree of Dr. Bronfenbrenner's professional care be constitutionally warranted under the law of defamation. Even if, after exhaustive discovery, the plaintiff corporation ultimately were to lose on the defamation claim, *not* because the researcher spoke the truth, but because the researcher's methods failed to uncover data supporting a contrary conclusion -- were to lose, that is, because her very negligence in

conducting the research meant that she had no doubt about what she erroneously uttered at the time -- the plaintiff would be vindicated in the court of public opinion by having discredited the research and the researcher.

However, as the Supreme Court acknowledged in a series of cases flowing from the security-loyalty programs of the 50s, the very process of legal inquisition into the substance of academic research poses a significant chilling effect on academic freedom. In *Sweezy v. New Hampshire*,[12] the Chief Justice, writing for the plurality, stressed the need to circumscribe "The power of compulsory process" when its exercise infringes upon "such highly sensitive areas as freedom of speech . . . and freedom of communication of ideas, particularly in the academic community." He explained, "The essentiality of freedom in the community of American universities is almost self-evident . . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust." Justices Frankfurter and Harlan concurred separately to emphasize the impact such an inquisition would have on academic freedom, especially in the "social sciences," in economics and in law. "For society's good -- if understanding be an essential need of society -- inquiries into these [social and legal] problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible."

Academics are not unknown to be risk averse. The prospect of being confronted with a suit by a well financed corporation or other organized group, the prospect of a protracted and professionally debilitating struggle over the scope of discovery, and the prospect especially of having one's professional integrity directly impugned in the process, must cause the cautious to steer wide of the zone of potential conflict lest he or she be swept up in it. But the most contentious social problems are those that implicate large financial interests or fire the strongest passions; and these have the strongest call on an academic contribution toward their resolution. The prospect of a lawsuit would work to deny the Nation a significant source of ideas, information and criticism on highly contentious social, economic and legal questions.

Nevertheless, in *Herbert v. Lando*, the Court rejected any *per se* privilege for the editorial process, even under a constitution that expressly accords freedom to the press; and it is doubtful that the Court would be willing to craft such *per se* a privilege for academics, about whom the constitution is silent. Whence the paradox a suit in defamation poses for academic freedom: The very process of determining whether or not the *Sullivan* standard is met, in order to accommodate free speech, implicates precisely the chilling effect on academic freedom that the Court has condemned of legal inquisition into academic investigation. I will have a few words to say about this at the close.

THE PARADOX OF POSTMODERNISM

The second paradox is posed by those in the academy who reject the epistemological assumptions on which academic freedom rests. Not those who have come to a deep epistemological skepticism, of whether truth is *ever* ascertainable, of whether it is even possible to draw a firm distinction between,

say, fact and representation; this line of thought has an ancient and honorable lineage. The concern here is rather with the currently fashionable categorical assertion that there is "no truth outside ideology,"[13] that "there is no objective reference point, separate from culture and politics, available to distinguish . . . fact from opinion" and that facts are consequently "merely the effects of a particular form of social power,"[14] that what we define as "truth" is "dependent on the social position or political orientation of the person asserting or accepting it."[15] Academic advocates of this persuasion argue that inasmuch as "scholarship is politics," academic work is to be judged accordingly by political tests.

The paradox -- of how the academic community can possibly afford academic freedom to some who would deny it to others -- is not new. The profession engaged the issue in great detail in 1970, in connection with the denial of the reappointment of Angela Davis by the Regents of the University of California for her having given voice to statements "so antithetical to the protection of academic freedom" as to be inconsistent with an academic appointment.[16] The Angela Davis case provides a useful historical foundation for the profession's response to today's far more radical assertions. Permit me briefly to rehearse it.

Prior to the Regents' final action, Professor Davis' teaching and extramural utterances were examined by an *ad hoc* committee appointed by UCLA's Chancellor. It inquired *inter alia* into two specific allegations: First, that Professor Davis utilized her classroom for the purpose of "indoctrinating" students; and, second, that her particular view of academic freedom would be destructive of that freedom. On the first, the committee noted the AAUP *Statement of Professional Ethics* and its admonition that the professor's primary responsibility is to seek and state the truth "as he or she sees it." "Implicit in this dictum," the committee opined,

> "is the understanding that "truth" is elusive, that it assumes various and often contradictory guises, depending on the perceptions of its pursuers, that one scholar's reasoned and discriminating conclusions may appear to another to be only uninformed and prejudiced opinions, and that a teacher's integrity, as distinguished from his ability, must be judged by the dedication with which he searches for truth, rather than by his perception of truth."

I.e. a judgment of academic integrity rests not on one's agreement *vel non* with the proposition the scholar offers, but on adherence to scholarly methods in offering it.

On the second, there was no doubt that Angela Davis would have denied academic freedom to others on political grounds. She maintained, for example, that Arthur Jensen had no right to talk about the genetic inferiority of black men. To her, those who espoused academic freedom divorced from social action were "accomplices in . . . exploitation and oppression." But, the committee observed,

> even if Miss Davis's speeches and views suggest a willingness to deny others the same freedoms which are invoked to protect her, we must recognize that to use this to punish her would *actually* abrogate freedom of speech, whereas she has merely *talked* about doing so.

The AAUP's committee of investigation concurred in the UCLA *ad hoc* committee's report; but it was concerned especially with the relationship of Davis' public speeches to her fitness for professional office. "Conceivably," the committee observed,

> "a case might have been made, upon full proceedings and upon a careful analysis, to show that Miss Davis *was so indifferent to* truth or *falsehood* or to other criteria of rational discourse in pursuit of political goals as to demonstrate unfitness to teach on the whole record. This was not done." [Emphasis added.]

In sum, the profession realizes that in order for knowledge to be gained, all manner of falsehood, even foolishness, has inevitably to be assayed; such is the "winnowing and sifting" of ideas the Regents of the University of Wisconsin endorsed in the wake of the *Ely* case in 1894. What the profession requires is that academics be held to a professional standard of care in the endeavor. The upshot of the Angela Davis case for the profession is that however generous, however capacious and all-embracing our tolerance for all manner of speculation and advocacy, we cannot tolerate arbitrary or indolent treatment of the evidence or manipulation of it no matter the motive. A professor of literature is perfectly free to teach that the Jewish influence on Western letters has been baneful, even degenerate; such is a matter of critical judgment, even of literary taste. But a professor of history is not free to teach that the Holocaust never happened, not because the idea is morally squalid, but because too much historical evidence is distorted or ignored.

This distinction is illuminated by the recent controversy surrounding the autobiography of Rigoberta Menchú. A study by David Stoll, concluding that some important parts of her book were fabricated, resulted in considerable soul-searching by some who had been assigning the book for classroom use. What one saw as an opportunity to teach the importance of "seeking truth in historical accounts,"[17] another saw as an opportunity to distinguish "personal" from "non-personal" narrative,[18] and yet another as an opportunity to teach the role of a culture-laden concept of "testimonial veracity"[19] in autobiography. No matter how powerful or foolish these approaches, academic freedom encompasses them all. But to some, it was irrelevant whether or not the events recounted were fabricated: To them the book represented a "larger" truth than the "literal" truth -- what one writer termed the "*so-called* historical truth."[20] (Emphasis added.) As one professor put it bluntly, "Whether her book is true or not, I don't care. We should teach our students about the brutality of the Guatemalan military and the U.S. financing of it."[21]

This won't do. We must teach the truth about Guatemala, as about all else, as best we know it; but to teach the truth we may not lie. Poland did not invade Germany in World War II and Elvis is dead,[22] howsoever our political ends or personal desires would have it otherwise. Such is the ethics of academic freedom.

If we are not to be judged by standards of scholarly care, then the claim to academic freedom -- the claim to academic independence -- collapses. Sanford Levinson has ruminated that the claim might still be sustained even where the "conversational community" (or "discipline") is not committed to a traditional notion of truth because it will "decide whose conversations it finds interesting, helpful, or illuminating."[23] This blinks at the fact that our faculties are sustained by the public and by trustees of private funds. There is little reason to expect significant public and private support for "conversational communities" devoted, apparently, to nothing but their own edification. As Thomas Haskell put it,

> "[I]f reality comes to be seen as entirely a social construction, incapable of representing or corresponding to anything outside language, the lay public would have to be incredibly trusting, even gullible, to let us academics retain the disproportionate voice we now have in the language games that are said to make the world what it is."[24]

Levinson recognizes that an astrologer would be hard pressed to find an academic appointment, even in a law school. The reason is not that astrology is not "interesting" or, indeed, of practical economic significance -- as any glance at the shelves of a major bookstore should show. Astrology is eschewed because it cannot pass scholarly muster.

What I have said may strike the listener as hopelessly inconsistent. On the one hand, I see a significant threat to academic freedom posed by a lawsuit, like Beverly Enterprises, that would subject an academic to searching judicial scrutiny of her data and methods. But, on the other hand, I have cautioned that academic freedom cannot be sustained without insistence upon adherence to standards of professional care and so of faculty willingness in appropriate cases to engage in the very kind of searching scrutiny I have abjured for the courts. There are, however, significant differences between judicial and professional accountability. Contrary to its pious pleadings, Beverly Enterprises lawsuit was brought not to search for truth, but to discredit the researcher and to serve as a warning to others to steer clear the particular zone of controversy in future. Moreover, a jury is not equipped by education or by the daily practice of teaching and research to appreciate the breadth (and limits) of academic freedom. A disciplinary hearing is not brought to bring public discredit; it applies a standard of care irrespective of the public import of the teaching or research at hand. And, as the AAUP's UCLA report observed,

> "Academic judges may have a higher tolerance for verbal contention, however farfetched or indiscreet, for reasons that go beyond mere guild loyalty; but they may be more concerned with

> evidence of charlatanism or overall quality in the speaker's total academic performance."

In any event, collective insistence on academic care is an inescapable professional obligation. As the AAUP's 1915 *Report* warned:

> "If this profession should prove itself unwilling to purge its ranks of the incompetent and the unworthy, or to prevent the freedom which it claims in the name of science from being used as a shelter for inefficiency, for superficiality, or for uncritical and intemperate partisanship, it is certain that the task will be performed by others . . . ."

THE ROLE OF FACULTY UNIONS

I see an important role for faculty unions to play in both these settings. First, the extent to which the University should bear a cost of defending the beleaguered faculty member (and any liability resulting from the lawsuit) should be a statutory "working condition," *i.e.* mandatory bargaining subject; but even where it might not, a union can bring intramural pressure to bear to insure that the institution stand in support of the faculty. The AAUP recently revised its Statement on *Institutional Responsibility for Faculty Legal Liability* to take account of cases like Kate Bronfenbrenner's, and some of the response from university attorneys questioned whether institutions should have any responsibility where the faculty conduct concerned was intentional or willful. Suffice it to say, the law of defamation concerns an intentional -- indeed, a constitutionally willful -- act; an exemption so crafted would leave researchers to fend for themselves. Accordingly, faculty unions should seek to assure that universities do the right thing as, I note, Cornell did in Kate Bronfenbrenner's case. Faculty unions might also wish independently to apprise the courts of how seriously they perceive the lawsuit to threaten academic freedom. Even though there is no "journalist's privilege," the courts have proven themselves sympathetic to the first amendment's implications in suits brought against journalists, and the logic of these cases provides some hope that the courts will be equal to the task in the academic setting.

In the second situation, the case of a dismissal or other disciplinary proceeding brought because of a failure to abide by the standard of professional care in teaching or publication, the union's position has to be equally categorical. The union must assure that the fullest procedural due process be afforded. It must assure that the facts are fully explored, that all the mitigating circumstances are explained, that the most persuasive arguments that can be mustered are presented to the body hearing the case. But it should not -- it cannot -- argue that academic freedom implies no professional standard of care.

ENDNOTES

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2. David Rabban, *Can Academic Freedom Survive Postmodernism?*, 86 CAL. L. REV. 1377 (1998).

3. Thomas Haskell, *Justifying the Rights of Academic Freedom in the Era of Power/Knowledge*, in THE FUTURE OF ACADEMIC FREEDOM 43, 71 (Louis Menand, ed., 1996) [hereinafter Haskell].

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5. *Id.* at 401.

6. Edward Shils, *Do We Still Need Academic Freedom?*, 62 AM. SCHOLAR 187, 194 (1993).

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8. 376 U.S. 254 (1964).

9. St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

10. William Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, in FREEDOM AND TENURE, n.4 *supra* at p. 100.

11. 444 U.S. 153 (1979).

12. 354 U.S. 234 (1957).

13. Joyce Appleby, Lynn Hunt and Margaret Jacob, TELLING TRUTH ABOUT HISTORY 203 (1994).

14. Gary Peller, *Reason and the Mob: The Politics of Representation*, in TIKKUN . . . TO HEAL, REPAIR AND TRANSFORM THE WORLD 163, 165 (Michael Lerner, ed., 1992).

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16. *Academic Freedom and Tenure: The University of California at Los Angeles*, 1971 AAUP Bull. p. 382.

17. Leonard Gordon, Letter to the Editor, *The Chronicle of Higher Education*, Feb. 12, 1999 at p. B11.

18. R. Ruth Linden, Letter to the Editor, *id.* at p. B3.

19. John A. Peeler, Letter to the Editor, *id.* at p. B11.

20. R. Ruth Linden, Letter to the Editor, *id.* at p. B11.

21. Robin Wilson, *A Challenge to the Veracity of a Multicultural Icon, The Chronicle of Higher Education*, Jan. 15, 1999 at p. A14 (quoting Professor Marjorie Agosin).

22. Eric Hobsbawn, ON HISTORY 6 (1997) (W e cannot invent our facts. Either Elvis Presley is dead or he isn t .) .

23. Sanford Levinson, CONSTITUTIONAL FAITH 178 (1988).

24. Haskell, n.3 *supra* at 73.

ACADEMIC FREEDOM

C. STOPPING SLAPP SUITS: A PROPOSAL

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Corporations that want to silence academic critics have discovered a powerful new weapon by using what are known as SLAPP suits (Strategic Litigation Against Public Policy). SLAPP suits are a highly effective way to silence, frighten and injure critics -- and at very low cost to the plaintiff. One area in which SLAPP suits are being used is by employers as a weapon against unions and against those academics who provide support to unions through their research. When this happens, academics find they are lonely Davids facing corporate Goliaths armed with money, access to lawyers, and the slowness of court processes. Even when academics have the support of their home institutions, they are unlikely to escape without serious and even fatal wounds.

Take the case of John Russo. From 1986-1989, Russo taught a labor education program for United Food and Commercial Workers Local No.880 in northeast Ohio about restructuring in the grocery industry and its impact on workers. Russo helped develop organizing, research, media, union, and community outreach programs that resulted in stopping industry restructuring and resulted in thirty-six newly organized stores in eighteen months. PBS carried a story about the program, and it was adopted nationwide by the UFCW.

The National Grocery Association responded by filing an antitrust suit against the union and John Russo. The plaintiff Grocery Association claimed that it had to have Russo's research in order to understand the union's thinking. What followed were three years that were devastating to Russo personally and professionally. He had to face three years of legal expenses, the stress of litigation, and time spent preparing for depositions and other court proceedings. Perhaps most devastating of all, Russo lost three years' work on his research. In the end, he was unable to complete and publish his two hundred page manuscript. This is a serious blow to any academic.

We were first alerted to the potential harm of such suits when we learned about the SLAPP suit brought by Beverly Enterprises against Dr. Kate Bronfenbrenner of Cornell University. On February 9, 1998, Beverly Enterprises, the largest nursing home company in the United States, filed suit against Bronfenbrenner, the Director of Labor Education Research at Cornell University. Beverly, the country's largest private nursing home owner, claimed that Bronfenbrenner had defamed it when, in her testimony before a congressional town meeting, she stated that her research showed that Beverly was a notorious labor law violator. Dr. Bronfenbrenner was invited to testify at the meeting because of her well-recognized research into union organizing and employer opposition and in connection with legislation introduced by Rep. Lane Evans (D-IL) four days earlier. In bringing this lawsuit, Beverly sowed widespread concern, confusion, and outrage in the academic and labor communities.

It is difficult, indeed almost impossible, to believe that Beverly brought this lawsuit to obtain monetary compensation from Dr. Bronfenbrenner for the pecuniary injury caused by her statement. We believe that Beverly's only reason for suing could have been to punish Dr. Bronfenbrenner and to serve as a warning to others who might consider scholarship or public statements critical of Beverly's approach to labor law.

Any lawsuit causes hardship for the defendant, even when the defendant ultimately prevails. The impact of a lawsuit by a well-resourced corporation against even as well-respected an individual such as Bronfenbrenner can be particularly damaging. Beverly has money, lawyers, and public relations staff. Dr. Bronfenbrenner does not, nor do most academics.

Dr. Bronfenbrenner is one of the preeminent labor researchers in the United States. She has done the sort of unpopular research others have passed by. It addresses key issues too long ignored. If she weren't taking on these issues, it is not clear who would. The filing of the *Beverly v. Bronfenbrenner* suit visited disincentives on her that had the potential to create considerable hardships that should concern congress, academics, and the public at large. Not only did Beverly's lawyers seek large monetary damages, but also they demanded that Bronfenbrenner turn over all her confidential research materials.

It seemed clear to us that the suit was more designed to intimidate and silence a well-respected critical voice than to remedy any wrong done to Beverly. Therefore, on February 20 we sent a call over the internet asking labor teachers and researchers, law professors, and constitutional law scholars to endorse a statement condemning Beverly Enterprises for using the blunt weapon of a defamation lawsuit to stifle discussion of its labor record.

The public response by members of the academic and labor communities condemning Beverly's actions was overwhelming. By Tuesday, so many endorsements had come in, we sent a second request telling people no more signatures were needed. Endorsers included two former secretaries of labor as well as professors, scholars and intellectuals from around the world. The American

Association of University Professors and Cornell University provided legal support for Bronfenbrenner. The case received considerable publicity, most of it, including a report on National Public Radio highly critical of Beverly. The case was dismissed by the judge on the grounds of privilege, and Beverly finally withdrew it.

We were delighted. Concerted action by academics and practitioners overcame an attempt to stifle public discussion of Beverly's poor labor relations record. However, we soon realized that in many ways Beverly won. Bronfenbrenner had to bear the usual burdens of being sued, and they are considerable. For a year, she had personal and professional time consumed by the lawsuit and the emotional stress being sued entails. She was faced with the real possibility of having to choose between breaching the confidentiality she promised her sources and which is crucial to the continuation of her work or going to jail for refusing to turn over her research. This would have been a painful choice. Finally, the mere act of filing the suit managed to make Bronfenbrenner controversial and undercut the perceived value of her work. Subsequent events suggest that some no longer see her as an objective researcher, even though her data and methodology retain the same validity.

Democracy demands that the public be engaged in the issues of the day. Open, free, and meaningful debate is not necessarily engaged in without pain. When issues matter, people are likely to disagree. Even so, these disputes must be public and free from coercion so that, by our interaction, we can grope our way towards wisdom. Academics play a key role in doing the research and in publicizing the findings that bring these issues to light. SLAPP suits -- even one with as happy an ending as in Bronfenbrenner's case -- stifle those voices. Other academics who hear of a suit may now worry about being sued or about revealing their sources should they speak publicly about their research. And if they can't speak publicly, they will eventually ask: what is the point of doing research that might offend a powerful corporation?

Even though it was heartening to see the outpouring of support for the Bronfenbrenner case, this is not the norm and we can't expect this to happen in subsequent cases. Inevitably future suits will provoke less outrage because they will be more familiar. Gathering signatures, and alerting the media is time consuming, and subsequent cases are likely to strike the media as less newsworthy.

Our experiences with the Bronfenbrenner case and information about others convince us that academics need to establish a regular body to investigate claims that a lawsuit is being used to encroach on academic freedom. The organizations which regularly represent academics -- the National Education Association, American Federation of Teachers, and Association of American University Professors -- can and should join together to establish and support this investigatory body.

If such a body determines that the suit is indeed a SLAPP suit, it then should have a regular process to publicize this fact and its findings. There are a number of highly effective ways in which publicity can put an end to SLAPP suits. Indeed, the involvement of lawyers and law firms in prosecuting the cases opens them up to discipline by their state bar associations for violating the Code of Professional Conduct. In severe cases, state attorneys general might be notified of the problem. In addition, law school placement offices can inform law students that they might not want to associate with a firm that engages in this sort of conduct.

The use of litigation as a club to defeat democratic processes and open discussion needs to end. Academics are particularly vulnerable, because they are more likely than most to have information which can be used to afflict the comfortable. Democratic institutions demand that access to this information be unhindered. Establishing boards that can police these lawsuits and use information to put an end to SLAPP suits can play a vital role in enhancing democratic and open discussion of the controversial issues of our day.

IV. DISTANCE LEARNING AND COMPUTER TECHNOLOGY ON CAMPUS

A. Alice, the College Teacher, and the Rottweiler in Wonderland: The Prospects and Problems of Distance Education

B. Cyber Unionism: A New Blueprint for Organized Labor in Higher Education

DISTANCE LEARNING AND COMPUTER TECHNOLOGY ON CAMPUS

A. ALICE, THE COLLEGE TEACHER, AND THE ROTTWEILER IN WONDERLAND: THE PROSPECTS AND PROBLEMS OF DISTANCE EDUCATION

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In mid-1997 there were some 19 million individuals who used the Internet at the office. This number jumped to 32 million in 1998. And 37 million homes used the Internet, up from 19 million in mid-1997. Thus the Internet is being used at home a total of 65 million hours per day.

Just a few more quick statistics: 30 years ago there were three computers termed hosts (computers that could be directly reached through the Internet). As of January, 1999 that number was 43.2 million, and it is expected to increase to 100 million worldwide by 2001 (if we get past y2k). Electronic commerce accounted for $27.4 billion in 1998,and is expected to grow to $978.4 billion by 2003.

In higher education, we have the phenomenon of online courses. Not a day goes by when I do not get a mailing, an article, or a notice about some other electronic development: the issue of *Community College Week* devoted to the Internet; the announcement that eight community colleges from California to Florida have formed a new distance learning network; the conference held on online learning; the advertisements promising "Let us help put your courses and campus online in 60 days—guaranteed."

There is a virtual Niagara of information and an increased speed of communication. Current optic transmission lines can carry 1 to 2 gigabits per second. A gigabit is a billionth of a second, so one is to a second what a second is to 31.7 years. At current speeds, the Library of Congress' entire collection of books could be transmitted in just over five minutes. Come to think of it, just consider how much information there is in the air all around us: am, fm, uhf, vhf, short-wave radio, television, CB radio, walkie-talkies, cell phones, cordless phones, telephone satellites, microwave relays, faxes, pagers, taxi calls, police, sheriff, hospitals, fire departments, telemetry, navigation, radar, the military,

government, financial, legal, medical, the media—trillions and trillions of separate little bits of electronic information all about us at all times.

We are in the midst of a learning revolution. In 1993 Peterson's "Distance Learning Guide" counted just 93 cybercolleges; the 1997 edition lists 762. More than one million students now take courses from those colleges. How much longer before the numbers begin to soar? At UCLA students can work individually on physics problems using a CD-ROM developed there, and students are asked to solve problems on an interactive web site giving the faculty member instant feedback on how well students are doing, allowing her to tailor class time to areas where students need more work. Rio Salado College in Arizona serves thousands of students through distance-learning courses and full degree programs too that begin every other week, and are offered at some of 200 community sites in the region, including credit classes in 20 high schools. The University of California at Berkeley had a 65 percent increase in online enrollment last year in 42 courses; by the end of this academic year, they expect to have 175 courses available. Some are projecting that in the future nearly every course will have a web-based component that supplements and supports the course. For example, all courses will be videotaped and students can review the videotape online.

Let us say these numbers and projections are wrong by half; that is still colossal growth!

Now some of that growth is due to children playing games on the Internet. How does it make you feel to think that a future president of the United States is probably at this very minute standing in a trance at the controls of a video game, zapping rocket ships and destroying worlds?

This growth reminds one of Alice in Wonderland, where she hastily puts down the bottle, saying to herself: "That's quite enough—I hope I shan't grow any more....I do wish I had not drunk quite so much!"

Like Alice, our higher education system and its colleges have grown. But bigger is not necessarily better. And with bigness come problems we did not have before.

Of course some changes are hard to accept. Take what Martin Van Buren, then Governor of New York state wrote to the president of the United States in 1829: "The canal system of this country is being threatened by the spread of a new form of transportation known as 'railroads.'...As you may well know, railroad carriages are pulled at the enormous speed of 15 miles an hour by engines, which, in addition to endangering life and limb of passengers, roar and snort their way through the countryside. The almighty certainly never intended that people should travel at such breakneck speed."

We are hurtling ahead, in higher education, at breakneck speed, toward an uncertain future in the delivery of instruction. We are in a new 24-hour-day society, where you can do round-the-clock banking, shopping, and studying.

Literally, this market never sleeps. As a result, you can be sure that there will be a great deal more of "distance learning," that is, instruction given elsewhere via printed materials reproduced by facsimile machine, computer programs delivered by telephone to the home, and telecommunications materials produced by various providers and relayed by colleges and schools and libraries. Utilizing the concept of asynchronous learning, the teacher can still teach at 9 a.m., but the student may be learning via lotus notes or the Internet at 5 a.m., midnight, or any other time. The teacher becomes, in many settings, a multi-media coordinator, for other delivery systems will be in use: videodisk, videotext, audio and videocassette recorders, telephone, videophone, radio, newspaper, closed circuit television, open broadcast television, learning packages including print and non-print materials, home computers, two-way interactive classrooms such as we have in Prince William Sound Community College in Alaska whose district serves less than 20,000 individuals--but they are spread over 45,000 square miles--that is an area larger than any one of 19 different states and almost as large as 11 others.

These developments are wonderful and hold out great promise, but they also pose new challenges, and they are hardly problem-proof.

The Middle States Association of Colleges and Schools, our accrediting body in this region, appointed a task force in 1995 to deal with issues of distance learning, and it produced a publication called *Guidelines for Distance Learning Programs*. It deals with such issues as articulating the benefits students will derive; the role of the faculty; faculty training; modes of compensation; the notions of "contact hours" and "prep time" in a distance learning mode; access to computers, fax machines, and long distance telephone lines; the role of the library; the measurement of outcomes; the differences in testing; the fiscal requirements; and, of course, intellectual property rights.

A prominent example of how we can be fooled by the prospect of online research involves the death of Alger Hiss and a warm letter from Leon Botstein, President of Bard College. One columnist remembered that Bard College had an endowed chair for an Alger Hiss Professor of Social Sciences and so did a Nexus search for all articles mentioning Bard and Hiss. Within 12 seconds the database counted 109 articles, but many were of no use. Why? Because they were about Shakespearean times when the audience would often boo and hiss when the villain came on stage. Hence the search for Bard and Hiss turned up articles on this phenomenon.

Moreover, there can be student transgressions. For example, this academic year, our head librarian called to my attention that a student had open not one, but three sessions of Netscape, because he said he was trading stocks. She said that practically every terminal on the main floor was busy with students on the web, everything from car sales to stock trades, as well as legitimate college work. If a journey of a thousand sites begins with a single click, one student can tie up a machine for hours if we are not careful.

If you are a faculty member, asynchronous learning does require some change in your teaching mode: how you interact with students is the most obvious, when they are not here in a room in front of you. As one interested in accreditation, I have other concerns, and so should you: how do we insure quality? Are learning outcomes clearly defined? Has faculty been involved properly? Are training systems in place to help faculty members use different delivery methods? Is support staff available? Do we accurately represent the distance education program when we advertise it? Are students adequately apprised of services available such as bookstore, financial aid, and academic advising? Have adequate steps been taken to provide library learning resources? Are the credits transferable? How do we set tuition rates, especially for out-of-area students? What about intellectual property issues: who owns the materials that faculty members develop? Does it matter that they were developed on institutional time? On sabbatical leave? These are thorny, but not insoluble issues. Nonetheless, they are pointed up by an announcement this month from Drexel University that it should own the rights to all on-line course materials, sharing any profits with the professors who developed them; some professors, however, countered by saying that they would not give up ownership of their courses.

These issues have been studied increasingly in recent years. For example, this year the College Board released a report entitled: *The Virtual University and Educational Opportunity: Issues of Equity and Access for the Next Generation*. It deals with the issues of computer inequality; will the "rich" get "richer": who will benefit and are there new barriers to the traditionally underrepresented in higher education? ; whether the student of the future will ever have to leave his or her workplace to enter a classroom in order to receive training; who will regulate a global market? How will students distinguish among providers of virtual training, and how will employers evaluate skills and credentials acquired in the virtual mode? Will any costs be saved?

Just last year the Instructional Telecommunications Council produced a report entitled *Faculty Compensation and Support Issues in Distance Education*. Predictably it dealt with issues of pay, faculty selection, employee recognition, intellectual property rights, and faculty training. Although returns were sparse, the largest number of respondents was from community colleges!

Other sources for you include the March/April issue of *Change* magazine with articles which tell us that Friday is dreaded by some business school faculty members because *Business Week* goes on-line and many students access it before their teachers do. We are also told that many students now correspond via e-mail with the scholars in their fields (this past year I was able to tell my graduate class at Columbia how to access my web page and correspond with me by e-mail, and I learned that every student in the class save one had an e-mail address). We also learn in this issue that more than two-fifths of college courses used e-mail and a third drew on content from the web (I don't know about you, but I am skeptical when I read such numbers—it certainly is not the case at my institution nor any other I have visited). We also are told that more than 40 percent of the nation's colleges had some sort of computer literacy or competency requirement, and that

over 60 percent of public four-year institutions had a mandatory instructional technology (I.T.) fee. It says that more than three quarters of the two- and four-year colleges have I.T. support centers to assist faculty with instructional integration, and that more than half have a formal plan to use the Internet for marketing the institution to prospective students. The headline in one of the articles which drew my attention was that "all parties would do well to view distance, distributed, and online learning as a new, fourth sector of higher education, residing alongside (and not behind) research universities, residential colleges, and commuter institutions." One final article in this issue deserves attention because it seems to be saying that computers achieve results that courses without them do not. At our host college today, Baruch, remedial courses with computers achieved a 75 percent pass rate vs. a 50 percent rate for courses without computers, and the costs per passing student were 29 percent less! If that is so, this development bears watching.

One final citation: there is a new publication called Yahoo.com that in the latest issue ranks the 100 most wired colleges and universities. Included is the number of computers per 100 students, the recency of computer buys, online registration, distance learning, e-mail accounts, etc. Whether we are on that list or not, we will increasingly be compared to others, and more consumers, our customers, our students, will be making decisions based on our sensitivity to such issues and willingness to be with the times.

Late one night a burglar broke into a house that he thought was empty. He tiptoed through the living room, but suddenly froze in his tracks when he heard a loud voice say, "Jesus is watching you!" Silence returned to the house, so the burglar crept forward again. "Jesus is watching you, " the voice boomed again. The burglar once more stopped dead. He was frightened. Frantically, he looked all around. In a dark corner he spotted a birdcage and in the cage was a parrot. He asked the parrot "was that you who said Jesus is watching me?" "Yes," said the parrot. The burglar breathed a sigh of relief, then he asked the parrot: "What's your name?" "Clarence," said the bird. "That's a dumb name for a parrot," sneered the burglar. "What idiot named you Clarence?" The parrot said, "The same idiot who named the rottweiller Jesus."

Well, we are being watched, and we may not be able to escape the jaws of the problems unless we have the proper attitude and take on the issues directly. Having sessions like this one is a good beginning; exchanging successful practices with one another is another good idea. Alice was able to escape from Wonderland, but not before she experienced a great deal of discomfort. Let us avoid reinventing the wheel!

DISTANCE LEARNING AND COMPUTER TECHNOLOGY ON CAMPUS

B. CYBER UNIONISM: A NEW BLUEPRINT FOR ORGANIZED LABOR IN HIGHER EDUCATION

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When I hear talk from seasoned labor-management antagonists in Higher Education urging "collaboration" I generally wince, as it commonly rings hollow. Proponents appear eager only for a cessation of overt hostilities, a fragile cease-fire of sorts, and a short breathing spell with which to test the other side and possibly gain some valuable new advantage. They remain unwilling to take significant risks, and wariness remains the dominant feeling.

By "collaboration" I have in mind something quite different, something almost entirely absent from the current scene. History and habit not withstanding, I imagine a time in the early 21st century when former antagonists in Higher Education will dare to experiment with unprecedented collaborative relationships, the genuine variety marked by trust, integrity, and interdependence. Faculty unions and academic administrators will profit from mutual respect. They will help bolster the other's well-being. And they will share an elevating Vision of what higher education can and must accomplish.

Now, it is clear that to get there from here requires a substantial transformation in the culture of faculty labor unions on campus. Before that prospect is dismissed as hopelessly utopian, I hasten to contend that just such a transformation may actually be underway -- thanks to the extraordinary impact on faculty unions of computerization. While overlooked even by many of those directly involved, the impact of the computerization offers the best hope ever of

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*This essay draws on the author's 1999 book, *CyberUnion: Empowering Labor through Technology*, published in hardcover in May'99, and in paperback in September'99. Orders can be placed with M.E. Sharpe, at 1-800-541-6563, or 73764.1261@compuserve.com

soon having on campus labor organizations equal to the highest possibilities offered by my version of "collaboration."

A DIVISION OF THE HOUSE

Three types of faculty unions are evident today vis-a-vis uses being made of computers. The first, which I call Cyber Naught unionism, involves a bare minimum employment of computer potentialities. It is generally restricted to staid reliance on a mainframe for bookkeeping of dues and benefits data. The second, Cyber Drift unionism, moves spastically first in this direction, and then that one, lacking any rhyme or reason in its rudderless efforts. It stands out in its combination of aimlessness with thoughtlessness. The third, Cyber Gain unionism, is a proud model to aspire to, and one which sets the stage for the emergence soon of its 21st century faculty union successor, Cyber Unionism.

1) Cyber Naught faculty locals seek to preserve and persist, rather than update or innovate. Where computers are concerned, they employ them only or primarily to satisfy traditional business needs, as in accounting and bookkeeping (dues and benefit records; payroll data; etc.). They are content to use data processing systems to keep track of things and to codify standard business practices. Most are indifferent (the others, hostile) to what upgrades here might otherwise do to support people, plans, and progress .

The issue, then, is not as simple as whether or not a union or local uses computers: Rather, the issue is why and how. Put starkly, Cyber Naught unions and locals use computers merely to get through the day, and do so in as flat and uninspired a way as is possible. Officials settle for myopia and quietism

Much of the problem is rooted in conceptual inertia: Out-dated habits of mind have far too many of these labor leaders preferring form to function, protocol to results, and rhetoric to risk-taking. This is not only about failings of intellect; it is also about failings of the spirit. For if, as Orwell warned, poverty annihilates the future, so also in its own way does poverty of vision.

Cyber Naught power-holders want the future to be like the past, only more so. They treat faculty unionism as if it can only be a passive and reactive institution, and they act as a deadening hand on change. In consequence, their locals sleep-walk when they might stride, and they remain vulnerable in ways they hardly realize.

GALLOPING OFF IN ALL DIRECTIONS

Cyber Drift faculty locals move aimlessly, like a cork bobbing on a turbulent sea, though with far less likelihood than a cork of staying afloat. Bewildered leaders look on as if in a daze, union officers to whom things happen rather than people who make new beginnings. Caught in this hapless course, Labor's effort to use computers falls far short of its potential.

Computerization is persistently prolific, as it moves from stand-alone PCs to networks, and from computer-oriented humans to human-oriented computing. Its record affirms we are in the midst of a revolution, not an evolution. But you would never know this from the inchoate and directionless plight of a Cyber Drift union. These faculty locals are seldom the adequate and inspiring organizations they want to be thought of, much to the rue of all who really know them and understand how much more is possible.

LABOR'S BEST HOPE -- FOR THE MOMENT

In contrast with Cyber Naught types, Cyber Gain faculty locals make much of computer possibilities. The good news is their number appears larger with every passing year; the bad news is their ranks remain far too small for Labor's good. Worse yet, they are often thought the end-all, when in fact - for labor's sake - they must prove way stations on the way to becoming Faculty CyberUnions.

Cyber Gain locals employ computers to support people, plans, and progress, as well as to keep track of things (traditional business operations). They pour new wine into new bottles. Their use of computers can be creative (though as I shall argue later, it still does not go far enough). Officers, staffers, and activists alike appreciate how much can be done, and they enjoy adapting gains made elsewhere in and outside of Labor.

Much success here can be traced to conceptual advances. Progressive habits of mind have Cyber Gain labor leaders, staffers, and campus rank-and-file activists preferring function to form, results to protocol, and risk-taking to rhetoric. In consequence, their locals are dynamic operations, supple and original in ways in which they take justifiable pride.

REALITY CHECK

Before too glowing an impression is given, it should be noted that Cyber Gain faculty locals have many telling weaknesses.

To begin with, most have little or no knowledge of the existence of one another. In keeping with the costly isolation of locals from other locals, they are often busy re-inventing the wheel instead of trading good ideas back and forth. Despite conferences the AFL-CIO, the NEA, and the AFT have run to encourage cross-fertilization, despite workshops held regularly at the AFL-CIO George Meany Center, and despite the efforts computers specialists of 12 or so major unions are making to stay in touch, it is as if the Cyber Gain organizations were ships passing at night.

Second, Cyber Gain faculty locals often try to do it on the cheap. Many are reluctant to pay the annual maintenance costs required to keep a complex, multi-machine system up and going, better yet constantly upgrade it. In consequence, they often flounder trying to best computer problems they should not have had in the first place.

Finally, and most telling of all, the Cyber Gain faculty locals I studied had too little in the way of an overarching vision. Many seemed to have lost sight of why they had started using computers to begin with. That is, they were not asking good questions about the desirability of this or that use with reference to the organization's well-being, with reference to what the rank-and-file might get from it (or lose to it). Instead, they were weighing computer uses in small-minded, rather than in grand ways, and they were missing transformational opportunities.

More specifically, where computer applications are concerned, Cyber Gain faculty locals often remain frozen in the first generation of Internet use. They are preoccupied with meeting straight-forward informational needs. Their Web site typically offers their logo and basic facts, a static display critics dismiss as "brochure ware" or "billboards." They fail to understand, or decline to value the fact that second generation applications are quite different: Known as transactional, they emphasize the dynamic participation of the parties, rather than accept passivity, as at present in far too many Cyber Gain faculty organizations.

While the Cyber Gain model is clearly superior to the Cyber Naught and Cyber Drift options, it will not do. It rebuilds, but it does not adequately renew. By failing to take the full potential of computerization boldly into account, Cyber Gain faculty organizations do not so much deal with the future as they streamline the past. Only a far more ambitious use of computers will really do the job. I think Cyber Gain faculty unionism will be adequate for only a few more years. The early 21st century requires far more.

GETTING TO A THIRD WAVE CYBER UNION F-I-S-T MODEL

I am persuaded Labor's overdue use of computers, while necessary, is insufficient. If faculty unionism is to reinvent itself as rapidly, as thoroughly, and as meaningfully as appears necessary, far more than Cyber Gain unionism seems required.

Specifically, early 21st century faculty unions -- the AFT, the NEA, and the independents alike -- must experiment with an ambitious and creative alternative to the Labor status quo, one that dares to incorporates futuristics, innovations, services, and labor traditions (F-I-S-T) - all of which go better when they build on creative computerization.

The first such aid, futuristics, empowers as only foreknowledge can. The second, innovations, energizes as only creativity can. The third, services, engages as only rewards can. And the fourth, traditions, bonds as only emotional ties can.

Faculty unionism urgently needs the rewards possible from reliable forecasting. And the rewards that innovations, such as computer data-mining, uniquely offer. And the rewards that computer-based services, such as volume discounts on PCs, can provide. And the rewards possible from the computer-aided modernization of traditions (as in the production of inter-active software rich with labor history material).

Why this unusual F-I-S-T set? Because as a futurist, a professional forecaster, I think faculty unionism must take advantage of this ancient, and yet also avant garde art form. Similarly, as a labor educator, I believe innovation a resource labor urgently needs to make more of. And like most labor educators, I champion both the extension of union-offered services and the celebration of Labor traditions, for goods and lore can make a powerful combination - especially if facilitated by new-finagled computerization aids.

Together, then, these four additional items (F-I-S-T) should provide faculty unionism with the foresight, the dynamism, the appeal, and the heart necessary to build on its Cyber Gain strengths and reverse its long-term decline.

Table 1

CyberUnion - Labor's Best (Only?) Third Wave Hope

Definition: A union or local that uses its Cyber Gain status to pursue much more development.

Attributes:
1) Led by technophile visionaries AND pragmatic power-holders (not always the same people).
2.) Always searching for informatics innovations that might make a difference.
3.) No hesitation to try experiments.
4.) Employs a "Learning Culture."
5) Has a participative bias; pro-democratic ethos.
6) Draws on Futuristics, Innovations, Services, and Traditions(F-I-S-T) - via informatics.

Gains:
1) Far more efficient and effective.
2) Inspires members and prospective members.

Losses:
1) Requires dedication of time and energy.
2) Cannot expect to succeed with every experiment; must have comeback capacity.

THE LABOR DIGERATI TO THE RESCUE!

Fortunately, a new generation of Web-faring union activists inside many faculty union locals are eager to get on with it. Labor's "digerati" types have lives steeped in Information Age technologies, and they are ever more effective in a net-worked world of union boosters. Forward-thinking and visionary, these techno-savvy men and women have a hefty dose of indefatigable optimism. Unlike many of their peers, their expectations concerning the renewing of faculty unionism are almost without limits.

When such activists envision the years ahead, they expect computers to make possible the unprecedented access of everyone in Labor to everyone else ... officers to members, members to officers, unionists to non-unionists, and vice versa. They dream about the rapid polling of the membership. The galvanizing of rallies or e-mail protests. The spotlighting of models worth emulating, and wrongs for the righting. The envision entire libraries put at a unionist's beck and call, along with valuable arbitration, grievance, and mediation material. They want open chatrooms and bulletin boards for unfettered telling and listening, for the creation of a High Tech electronic (virtual) "community" to bolster High Touch solidarity among real folk.

Guided by this growing cadre, faculty unions can soon move more and more locals into Cyber Gain status. And thereby invigorate the campus membership. Draw in new faculty members. Awe opponents. Intrigue vote-seekers. And move in this way to meet the aspirations that faculty union "netizens" have for the entire Labor Movement, aspirations focused on helping every local achieve CyberUnion status early in the 21st century.

Table 2

Comparison of Types of Modern Unions and Locals

Cyber Naught union/Local

If you don't get with it, you won't matter ("If you're out for lunch, you are lunch!"). Ignorance here is not bliss; it is fatal.

Cyber Drift Union/Local

If you don't have a clear sense of where you want your union/local to go, you won't get there ... or any other place really worth reaching.

Cyber Gain Union.Local

If you believe your union.local has it made, and need not go very far from the present, you are sealing a disappointing fate. Your reach must always exceed your grasp. Informatics means there is no status quo anymore – only ceaseless innovation or decline.

CyberUnion

If you dream a bolder dream, dare brighter moves, and take to heart the finest values of the global labor movement, you just might do us all honor.

REALITY CHECK

Computerization is no "silver bullet." It is a complex, demanding, and often exasperating tool, only as reliable and effective as the humans in charge. As well, it is no solo star. It works best when part of a mix in a faculty local that includes militancy, labor
law reform, political action, and so on. It works best when aiding such "high touch" efforts as "one-on-one" organizing, "shoe leather" vote-getting, "button hole" lobbying for labor law reform, and so on. It works best when kept as an accessory and an aid, rather than allowed to become a confining and superordinating system.

It would be a costly mistake of faculty unionists to confuse computerization with a magic remedy, almost as costly as present-day under-utilization of its remarkable potential. Which is to say, that while it cannot "rescue" Faculty Labor Organizations, unless Organized labor soon makes the most creative possible use of it, as with the F-I-S-T model, Labor probably cannot be rescued at all.

SUMMARY: FACULTY LABOR UNION PROSPECTS?

In his 1995 book, Navigating in Cyberspace, Frank Ogden, a leading Canadian futurist, warns "the next decade will make the past look tame. ...within 10 years, the technology that is hardly out of the starting gate will change 90 percent of our culture and society ." (Ogburn; 12, 3, 6)

Faculty Unionism operates in a New Economy - one "all about ... the ability to transform [organizations] into new entities that yesterday couldn't be imagined and that the day after tomorrow may be obsolete." (Tapscott; 43)

Imagine how farther along all this may be just a few years from now. By 2005 or so our insatiable appetite for information may have us -

- wear a compact picture-phone and computer on our wrist and dictate to it by voice, even as we enjoy listening to its "voice" in turn;

- use it to access any type of information, anywhere, at anytime;

- use it to stay "in the loop" and stay in touch with significant others all the time;

- use it to send and receive messages in and all languages, as if our own;

- use it to surf the Internet and Web with the stressless help of "smart" software that provides useful information even before we ask for it;

- and, feel empowered by these information aids as never before!

Even if only half of this is realized in the next few years, the rest is likely to be close behind, and the impact is likely to prove mind-boggling.

A remarkable information future beckons ... though some will make far more of it than others. Faculty Unionism can turn it to advantage, both for itself as a social movement and for its individual campus members, but the doing will not come easy, and the hour grows late.

If we are soon to earn genuine collaboration in campus labor-management relations, it will be because faculty unions five years from now will draw handsomely on what I call CyberUnion attributes (F-I-S-T). They will command respect as mature information-intensive power houses, fully the equal (and possibly the better!) of anything the campus administrators boast.

Unless and until Faculty Unions make evermore creative use of computer possibilities, collaboration will remain a very distant dream. Murray Kempton, one of the most insightful of recent writers about unionism, wistfully notes of seemingly appealing reforms -- "One sees at once that here is the way to get at the thing, and wonders why, with the sign painted this plain, the road has been so seldom followed." (Kazin)

It is time for faculty unions to heed signs that point away from Cyber Naught and Cyber Drift unionism: It is time to earn collaboration from the platform of CyberUnionism, an invigorating model for the 21st century's Information Age.

RECOMMENDED RESOURCES

Cohen-Rosenthal, Edward, ed. *Unions, Management, and Quality: Opportunities for Innovation and Excellence.* Chicago, IL: Irwin, 1995. Thirteen original essays, jointly authored by union and management "partners" in achieving outstanding workplace cooperation. Illustrates how a labor organization can break from old ways and construct a new and better reality.

Rawlins, Gregory J. E. *Slaves of the Machine: The Quickening of Computer Technology.* Cambridge, Mass.: MIT Press, 1997. Easily one of the most engaging, informative, and provocative explorations available of computers, artificial life, and Cyber Age possibilities. Dares to explore the possibility that the computer is not a "toaster," but a "kitten" -- and all the awesome implications thereof.

Shostak, Arthur B. *Robust Unionism: Innovations in the Labor Movement.* Ithaca, NY: ILR Press, 1991. An exploration of the strengths and weaknesses of over 200 major ongoing reforms, paying special attention to their transferability. Features close-ups of remarkable change-agents and very varied projects. Many of the unions and locals cited warrant the honorific label - Cyber Gain operation.

Zohar, Danah. *Reviving the Corporate Brain.* San Francisco, CA.: Berrett-Koehler, 1997. Makes a good case for transforming organizations to thrive on uncertainty, deal creatively with rapid change, release the full potential of leaders and members alike.

For a fine example of a site maintained by an enthusiast, see IBEW member James Border's Web site in Nashville, Tennessee (www.geocities.com/SouthBeach/Sands/1173/ibew.html). A member of IBEW Local Union 429, Border has developed his own unofficial IBEW Web site where he displays some labor links and basic information about the IBEW.

Special attention should be paid the AFL-CIO Web site, available at www.aflcio.org, and called *Today's Unions*. It offers an "Executive Pay Watch" service that keeps tabs on exorbitant CEO salaries. It also has a "Congressional Page" with e-mail addresses and voting records of all the members of Congress.

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3. Tapscott, Don. The Digital Economy: Promise and Peril in the Age of Networked Intelligence. New York: McGraw-Hill, 1996.

V. GRADUATE STUDENT UNIONIZATION

A. Academic Collective Bargaining the University Of Wisconsin—Teaching Assistants Association Case Description

B. The Current Status of Graduate Student Unions: An Employer's Perspective

GRADUATE STUDENT UNIONIZATION

A. ACADEMIC COLLECTIVE BARGAINING THE UNIVERSITY OF WISCONSIN -- TEACHING ASSISTANTS ASSOCIATION CASE DESCRIPTION

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Collective bargaining for university faculty and other teaching professionals traces its origin to the late 1960s at the University of Wisconsin-Madison. The University developed a formal arrangement (Structure Agreement) for collective bargaining with the Teaching assistants Association in 1969. The Structure Agreement substituted for enabling legislation and out of this arrangement developed a formal collective bargaining relationship that exists still today.

STRUCTURE AGREEMENT AND ELECTION

The Structure Agreement was developed by the parties with assistance from collective bargaining leaders in the state. It created procedural arrangements for the collective bargaining relationship including a unique election system. The Structure Agreement also established the scope of bargaining which became a matter of substantial controversy.

The election was held in May, 1969 and the Teaching Assistants Association (TAA) became the recognized bargaining agent for nearly 2000 teaching assistants and graduate professional staff. The subsequent negotiations were non-traditional in labor relations terms. They were public events reflecting the activism of the times.

NEGOTIATION ISSUES

The issues that caused the most controversy were the terms of appointment, a human rights clause and the matter of educational planning. The latter issue dealt with who would have final control of curriculum and course issues – faculty or TA's.

The initial negotiations involved a major strike in March, 1970. This was the first collective bargaining strike of academic staff in higher education. Records show that as many as two-thirds of classes were not held in a number of departments on campus. The strike ended in April of 1970 and the first agreement was ratified by a vote of 534-348.

NATIONAL DEVELOPMENT

The resulting agreement was the first for academic staff in American higher education. It was followed quickly by similar agreements at Rutgers University and the University of Michigan. Within a year a number of faculty-university agreements were negotiated in Massachusetts, New York, California, Michigan and Pennsylvania.

The academic collective bargaining movement spread to private colleges in the 1970s but nearly stopped with the Yeshiva decision which declared faculty in private colleges to be part of management and not covered by the boards National Labor Relations Act. The dominant expression of academic collective bargaining is in public sector universities covered under state labor laws that specifically avoid Yeshiva-type conclusions or administered by state labor boards that have reached different conclusions from their federal counterpart. The national Center for the Study of Collective Bargaining in Higher Education and the Professions reports that in 1997 there were 250,719 unionized faculty on 1,097 college campuses. Nearly 96 percent of these faculty are employed at public institutions of higher education.

Academic Collective bargaining traces its roots to the University of Wisconsin – TAA negotiations. That bargaining relationship is still in place. It represents the first TA agreement, of which there are now thirteen nationally covering nearly 20,000 teaching assistants. More importantly it represents a stimulus for general faculty negotiations which has become a major force in higher education in many states.

GRADUATE STUDENT UNIONIZATION

B. THE CURRENT STATUS OF GRADUATE STUDENT UNIONS: AN EMPLOYER'S PERSPECTIVE

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This article will explore the following issues; organizational and institutional factors that have spawned a unionization movement among graduate students[1]; how graduate student unions differ from those of full-time faculty; a brief analysis of the demographic and institutional variables associated with graduate student unionization; major organizational challenges, from two perspectives: the university and graduate student unions'; followed by a brief discussion of the long term implications of this phenomenon.

ORGANIZATIONAL AND INSTITUTIONAL BACKGROUND

The marriage of graduate student unions to the labor movement involved a long courtship. As in countless other situations in academe, the failure or inability of institutional leaders to address employment related concerns of graduate students resulted in fertile fields for union organizers. The courtship was structured and solidified in an environment of tremendous growth in graduate education and research productivity in American higher education.

Consider the following data which comes from ongoing research by scholars affiliated with the National Center for Postsecondary Improvement at Stanford University:

- between 1950 and 1990, the number of institutions of higher education increased from 1800 to approximately 3800;

- during this time period, enrollment in postsecondary education jumped form 2.7 million to approximately 14 million;

- between 1960 and 1990, the number of full-time faculty grew from 230,000 to approximately 700,000;

- during this time period, the number of part-time and adjunct faculty tripled to 300,000;

- between 1965 and 1990, federal research support to higher education grew from 8 million per year to approximately 16 million;

- during this same time period, the number of doctorates conferred in American research institutions grew from 6100 to approximately 40,000 per year;

- between 1976 and 1991, enrollment of individuals over the age of 30 has doubled, the enrollment of women has gone from 750,000 to approximately 7 million;

- during this same time period, the number of "executives" and administrators grew 50%, from 100,000 to 150,000, the number of non-faculty professionals doubled to approximately 400,000, and the number of instructors and research assistants tripled to approximately 100,000.

- This growth (in enrollment, institutions, diversity, et al.) of the higher education sector has come with massive increases in the number of adult and part-time students, tuition has increased by approximately 100% in many locations, large research universities have become mega-universities (often the largest employers in their respective locals).

- The evolution of graduate education has been predicated on the assumption of an ever expanding funding base for a select group of universities. By the mid-1990's, approximately 3% of all institutions of higher education awarded 80% of all doctorates and 50% of all master degrees.[2]

The institutional and demographic growth described above would not have, in and of itself, given rise to graduate student unions. Other, less robust and problematic factors intruded. Consider the following:

- The cost of attending a private college or university (for a four-year degree) has jumped to $33,000 per year. We are witnessing consumer resistance to the high cost of education, coupled with calls for accountability, skepticism toward the value of postsecondary degrees, increased public scrutiny of institutional operations, and legislative attempts to mandate efficiency in workload, budgets, etc.

- Many institutions are devoting larger and larger portions of their operating budgets to student aid and scholarships.

- State legislatures in Florida and Ohio have endeavored to enact legislation mandating increased workload and classroom contact hours for faculty in public college and university systems.

- Government funding, as a percent of all higher education funding, has declined by approximately 38% in the last few years.

- Market pressures have resulted in the growth of non-traditional institutions, now competing for student dollars (e.g., Walden University, the University of Phoenix, virtual universities, and the like). This competitive environment has generated pressures to "vocationalize" professional degrees.

- The time needed to complete an advanced degree has elongated, in some cases, to six or seven years.

- By 1995, approximately 40% of full-time faculty in American higher education, primarily but not exclusively in the public sector, were represented by labor unions for purposes of collective bargaining. It is estimated that upwards of 60-70% of the laborers, clerical, engineering, technical, and related non-faculty personnel are unionized in the U.S., but definitive numbers are elusive.[3]

At present, many universities, particularly those in the research sector, have implemented schemes to "restructure" and reengineer workforces, downsize full-time staff and hire an increasing number of adjunct faculty. The era of "low cost and high return" for a graduate degree is over, as universities seek to continue doing what they have always done even with declining resource bases. In many institutions, there has been a change in the academic climate and culture, from one of deliberative consultation to negotiation and politicization between competing interest groups with well articulated and vested interests. A general increase in the tension between faculty, non-faculty and the administration (collective bargaining being one manifestation) coupled with the collapse of the job market for new Ph.D.'s has also encouraged graduate student unionization. Through all the trials and tribulations, the continued growth in postsecondary systems, the number of doctorates being conferred keeps going up! Those on all sides of the graduate student unionization debate lament much of what as occurred in graduate education in the last twenty-five years.

MORE IMMEDIATE REASONS FOR GRADUATE STUDENT UNIONIZATION

Graduate students have been organizing for the purposes of collective bargaining for thirty years. The causes of organized activity among graduate students are varied. While it is possible to view the broad landscape, the lens blurs when focusing on one set of topographical factors. The unionization movement in higher education in general is now a river fed by hundreds of smaller tributaries, many from a variety of sources. To the extent we are able, it is of value to view

Figure I
Status of Graduate Student Unions in U.S. Institutions***

INSTITUTION/SYSTEM	AGENT	STATUS
City University of New York †	AFT/AAUP	Contract
Cornell University**†††	UAW	No Recognition
Eastern Michigan University *	AAUP	No Recognition
Florida State University *	IND	No Recognition
Indiana University	CWA	No Recognition
Michigan State University	IND	No Recognition
New York University†††	UAW	No Recognition
Rutgers, The State University of New Jersey †	AAUP	Contract
State University of New York††	CWA	Contract
Syracuse University**†††	IND	No Recognition
Temple University *	AFT	No Recognition
Wayne State University *	AFT	No Recognition
University of California** (Eight Campus Units)	UAW	Negotiations Ongoing
University of Connecticut††	UE	No Recognition
University of Florida *	NEA	Contract
University of Illinois	IND	No Recognition
University of Iowa	UE	Contract
University of Kansas	AFT	Contract
University of Massachusetts††	UAW	Contract
University of Michigan	AFT	Contract
University of Minnesota	AFT	No Recognition
University of Notre Dame	IND	No Recognition
University of Oregon**	AFT	Contract
University of South Florida *	NEA	Contract
University of Wisconsin	AFT	Contract
Yale University†††	HREU	No Recognition

* Full-time faculty are unionized and represented by the same bargaining agent.
** Faculty in one or more schools or divisions are organized. Counted as one (1) institution for purposes of this chart.
*** The entire universe; e.g., all graduate student locals are, to the best of my knowledge, listed.
† Graduate students are in the same bargaining unit with faculty.
†† Full-time faculty are unionized and represented by a different bargaining agent.
††† Private institution

the major reasons graduate students seek formal union representation. This is so for two reasons; first, to understand the consequences of graduate student unionization, we must be certain to have a firm grasp of the underlying causes. Secondly, in devising organizational and institutional solutions (or assessing blame -- which we are, unfortunately, so quick to do in academe), it behooves us to understand the causes so as not to invent solutions which may cause further deterioration of faculty-administration-graduate student relations or long term damage to graduate education and research productivity.

Although it may not seem the case from reading much of the literature, in my opinion, many faculty and administrators (and graduate students themselves) have a relatively clear understanding of the catalysts for unionization (and attendant problems), but have lacked the resources and political skills necessary to respond. That being said, let us review (not in any priority order) the causes of unionization among this constituency in postsecondary institutions.

- An elongation of the time needed to complete a graduate degree, coupled with; a) little, if any, job mobility in academe for a great majority of individuals who complete advanced graduate work and, b) increasing reluctance on the part of those completing advanced degrees to live in what they perceive as academic ghettos. Many older graduate students desire to start families, need health care coverage and job security, and perceive the faculty with whom they work to be living in comparative luxury. The words, "dignity and respect" fly off the pages of much of the literature published by graduate student organizers and graduate students themselves.

- Full-time faculty are increasingly reluctant to do the kinds of work and tasks presently being performed by many graduate students and research assistants (e.g., grading papers, teaching large freshman seminars, etc.). Unfortunately, one's prestige in large research universities seems to increase the further one gets from teaching undergraduates. Given the nature and type of work many graduate students are performing, they are undoubtedly a much cheaper form of labor. While cogent arguments can be made, based on models of economic efficiency and sound academic pedagogy, to utilize the services of readers, tutors, graduate assistants, adjunct and part-time faculty, and the like (rather than full-time senior professors), the "cheap and exploited labor" argument has been used with success by union advocates.

- Institutional and demographic variables associated with the emergence of faculty unionization in higher education have facilitated unionization efforts on the part of graduate students. For example, in many locals, enabling public sector labor legislation, public employment relations boards (willing to structure elections and hear cases with a sympathetic ear), evolving labor laws, and high percentages of unionized government and state employees (in addition to faculty and staff) have all facilitated unionization. It is not accidental that most graduate student union activity is associated with institutions and systems where faculty and other staff are unionized, or where enabling state labor legislation protects the process, where high percentages of

the public and private sectors external to the academy are organized, where organized labor has "clout" in state legislatures, or where administrative structures, in place to manage faculty or staff unions, can be utilized to address negotiations with graduate students.

• Labor unions in both the public and private sectors, particularly unions in declining industries, are diversifying, looking for new dues paying clientele. Just as universities have sought new revenue streams, so have labor unions. Traditional "industrial type" unions have agreed to represent graduate students, most often in cases where full-time faculty are not organized. At such institutions (New York University, Indiana University, Cornell, Iowa, or Yale), the traditional higher education bargaining agents (AAUP, NEA, AFT) have studiously avoided representing graduate students for fear of alienating the full-time faculty who are ambivalent or opposed to such unions. For example, graduate students are represented by the United Auto Workers at the University of Massachusetts, University of California, New York University, and Cornell University; the Hotel and Restaurant Workers Union at Yale, the Communication Workers of America at Indiana University and the State University of New York; and United Electrical Workers at the Universities of Iowa and Connecticut. On many campuses, graduate and research personnel are represented by independent or non-affiliated unions (see Figure I).

• In institutions where the professoriate is also organized by the AAUP, AFT, or NEA, the situation is more complex. Even when higher education union organizers and full-time faculty are ambivalent about (or may not fully comprehend the implications of) union drives by graduate students, they may be reluctant to stand by and witness the arrival of competing bargaining agents on campus. It is also the case that in larger unionized systems, full-time faculty union leaders may correctly surmise that representing graduate students will give the professoriate even greater leverage at the bargaining table. By and large, however, the primary constituencies of faculty unions are often interested in protecting the status quo and craft-like prerogatives and soon realize that gains made by organized unions of graduate students may come at their expense. Where graduate students are represented by the NEA, AFT, or AAUP, it is sometimes the result of bargaining unit composition. For example, the AAUP represents graduate students in three locations; Rutgers University and the City University of New York (where the AAUP eventually affiliated with the AFT). In these two institutions/systems graduate students were placed in the full-time faculty bargaining unit. At Eastern Michigan University, the AAUP also represents full-time faculty. Although the overwhelming majority of the organized professoriate is affiliated with the AFT, AAUP, and NEA, only 42% of graduate student locals are represented by these bargaining agents (see Figure II).

• The growth of organized activity among graduate students underscores two additional points. First, many graduate students are no longer sure who their "employer" is. For example, is it the University, the academic department, the school, a state funding agency, or federal contracting office? The confusion

generated by diffuse funding authorities, coupled with departmental autonomy in huge research institutions has led to situations, on some campuses, where graduate student organizing is not seen as deleterious to the department, school, or institution. Second, as graduate students pressure the university to treat them in a uniform manner, the implications for departmental and disciplinary autonomy may be profound. This is certainly the case at institutions where graduate students believe their work is not related to their graduate education, and they are, in fact, doing work full-time faculty shun (at a much lower cost).

THE ORGANIZED PROFESSORIATE Vs. ORGANIZED GRADUATE STUDENTS

Differences between the unionization movement of graduate and research personnel and full-time faculty are interesting and may provide insight into the long term consequences of graduate student unions. Major differences are summarized below:

- An inverse relationship between institutional prestige and organizing activity. At prestigious institutions which have not witnessed faculty unionization, organizing drives by graduate and research personnel are frequent. This is true at Yale, Michigan, Iowa, Berkeley, UCLA, Kansas, and other comparable institutions.

- Graduate and research personnel have, by and large, had more difficulty (beyond sympathetic rhetoric) gaining the interest of the major higher education faculty bargaining representatives in their organizing efforts. Approximately 42% of represented graduate students are affiliated with the NEA, AFT, or AAUP (see Figure II) whereas nearly all of the organized professoriate are represented by a combination of these agents.[4]

- The major points of negotiation for graduate student unions are recognition, compensation, and job security, followed by workload and grievance mechanisms. Traditional faculty unions are more often concerned with craft type prerogatives; e.g., control over governance processes, promotion, tenure, and reappointment processes, and the like. In general, faculty unions have sought to protect professional prerogatives and autonomy, while graduate student unions have focused on gaining acceptance, higher salaries, and job security.

- The responses of universities to organizing drives of graduate and research personnel, particularly where the full-time faculty have not been organized (e.g., Yale), are reminiscent of companies fighting industrial type unions. A high number of these graduate student locals remain "unrecognized" and only a small percentage have successfully negotiated labor agreements.[5] By and large, when the faculty unionizes, senior administrators and trustees are reluctant or constrained from engaging in organizational conflict which could generate negative publicity or animus from the state capitol. The anti-union

tactics employed against graduate student unions have rarely been used when the full-time faculty vote for representation. Where they have, it has been in the private sector; e.g., Boston University, where employers are generally less constrained than in the public sector.

• Graduate student unions have much less clout on campus than do faculty unions. The former have few "traditional levers" to compel settlement in the union-management arena. For example, strikes are less effective and less organized, there is high turnover in leadership positions, there is less sophistication in organizational communication, negotiation tactics and strategies. Despite the rhetoric, negotiations often drag on for years.

OBSERVATIONS ON INSTITUTIONAL AND DEMOGRAPHIC DATA

The following comments may be of interest:

• While traditional faculty union representatives may be somewhat ambivalent about negotiating on behalf of graduate students, when they do engage in the process, the chances of completing negotiations is greatly enhanced. Of the contracts in existence, 73% were negotiated with the support of traditional faculty union representatives. One explanation may be that in locals where faculty unions are not found, particularly the elite private sector, institutions have successfully engaged in concerted no-union campaigns. The presence of another faculty union, particularly in the public sector, enhances the likelihood that graduate students will eventually obtain a labor agreement.

• Unions of graduate students are most effective in larger public institutions/systems and least effective in the private sector where the full-time faculty are not represented. In the latter institutions, they are far more likely to be represented by an independent or industrial type union.

• Unions of graduate students have made inroads in the highly prestigious research sector which was originally thought to be immune to academic collective bargaining. However, this is where the bulk of the graduate students work. In the long run, the much heralded dichotomy between professionalism vs. unionism may be called into question. It is conceivable therefore that faculty working in these institutions may someday be more receptive to collective bargaining than has previously been the case.

• Graduate students received the most favorable treatment vis-à-vis collective bargaining when initially placed in the same bargaining unit as full-time faculty. This caveat is also true for librarians, coaches, and other non-teaching professionals who are similarly situated. Structural factors inherent in the external labor relations environment (e.g., enabling legislation, the presence of other unions at the state capital, etc.) have a spill over effect on the ability of graduate students to organize and negotiate effectively.

Figure II
Graduate Student Unions: Institutional and Demographic Characteristics†

† These data represent, to the best of my knowledge, the entire universe of graduate student locals as of 11/99.

AFFILIATION

Public	86%
Private	14%

REGION

Midwest	34%
West	31%
Northeast	25%
South	10%

BARGAINING AGENT

Represented by NEA, AFT, AAUP, or a merger thereof	42%
Represented by other bargaining agent	58%

ARE THE FULL-TIME FACULTY UNIONIZED?

Yes	46%
No	54%

ARE THE FULL-TIME FACULTY IN SOME SCHOOLS OR DIVISIONS (OR INSTITUTIONS WITHIN THE SYSTEM) UNIONIZED?

Yes	58%
No	42%

INSTITUTIONS/SYSTEMS WHERE GRADUATE STUDENTS HAVE NEGOTIATED A LABOR AGREEMENT

42% of locals have a labor contract, all are in the public sector. Graduate students have not gained recognition at any private institution.

WHERE AGREEMENTS HAVE BEEN NEGOTIATED, WHO IS THE BARGAINING AGENT?

NEA, AFT, AAUP, Mergers	73%
Others	27%

WHERE LABOR AGREEMENTS HAVE BEEN NEGOTIATED AND RATIFIED, ARE THE FULL-TIME FACULTY UNIONIZED?

Yes	73%
No	27%

Source Documents: *Directory of Graduate Student Employee Bargaining Agents and Organizations*, National Center for the Study of Collective Bargaining in Higher Education and the Professions, Baruch College, City University of New York, 1995; *Directory of Faculty Contracts and Bargaining Agents in Institutions of Higher Education*, National Center for the Study of Collective Bargaining in Higher Education and the Professions, Baruch College, City University of New York, 1997; *Academe*, Bulletin of the AAUP, 84(6), November-December 1998; During the Fall 1998, Spring 1999 follow-up phone calls were made to all graduate student locals.

MAJOR INSTITUTIONAL AND ORGANIZATIONAL CHALLENGES FOR GRADUATE STUDENTS

Although graduate students have received press coverage and have engaged in several highly visible job actions, the road to recognition and organizational stability, from an industrial labor relations perspective, has been bumpy. A majority of locals have failed to obtain either a labor agreement or recognition. While several graduate student unions have gained a foothold in a number of public systems and land grant institutions, unions have not yet been successful in most institutions where organizing activities have occurred and remain shut out in the private sector.

The reasons for this are varied and situational, but probably revolve around the following set of factors:

- Unions of graduate students lack sophistication in labor-management relations. They are far more ideologically bound than the organized professoriate in general, and certainly more ideologically driven than many in the American labor movement. The lack of sophistication is manifested in many ways; organizing rhetoric, perceptions toward the nature of power and influence in academe, naiveté about decision making processes (both academic and administrative) in large research universities, etc. During the recent strike at the University of California at Berkeley, for example, the union was unable to obtain the support of the Alameda Central Labor Council to endorse its job action. (Organized labor has bigger fish to fry.) Perhaps the entry of industrial type bargaining representatives will alter the status quo. This remains to be seen.

- Graduate student unions have significant organizational hurdles to overcome. Communication within the unit is difficult. Also, they have less clout than most groups on campus and depend heavily on the good will given student employees by faculty and university officials. In addition, there are high turnover rates on bargaining teams and team members have little, if any, collective bargaining training or experience.

- Graduate student unions may have unrealistic expectations (they may believe their own rhetoric) in regard to what faculty, administrators, or legislators will do to address their demands. They also risk being coopted by traditional faculty unions who may give lip service to their demands and then compromise when larger issues are at stake. It is also the case that graduate students are making demands for increased compensation and job security during a period when research institutions are faced with declining revenues, and health care costs are skyrocketing. It may be more economically feasible for a university to hire temporary or part-time faculty as readers, tutors, exam graders, etc., than pay for scholarships and related health benefits of graduate students and research assistants. To this extent, success at the bargaining table may come at a very high price as universities decrease overall use of full-time graduate students to pay for increased compensation for those who remain.

- Other costs associated with organized activities may become evident. The job market for new Ph.D.'s is tight; mobility depends on recommendations and good will from senior faculty. Engaging in strike activity and labor-management rhetoric is not the way to endear oneself to faculty in the department or school. Obtaining certain collective bargaining prerogatives may result in the development of a permanent class of unionized graduate students, unable to find full-time positions (or assume risk to do so) because of their dependence on compensation and benefits set forth in their labor agreements.

- While graduate students have been adroit in getting some major intellectual and disciplinary associations to consider their plight, they have generally not been successful in obtaining the support of the professoriate (beyond verbal support). Until this is accomplished, until graduate students can make the case that what is beneficial for them in a unionized context is also of value to graduate education, research productivity, the university, and full-time faculty in general, their movement will remain essentially where it is now; on the margins of influence and power.

FOR THE UNIVERSITY (EMPLOYER)

Collective bargaining with graduate students has been anything but easy for senior administrators and faculty at schools where organizing activities have occurred. Indeed, there are only a handful of instances where the process has not resulted in serious organizational conflict and a deterioration of consultative governance. The perception that what is good for research and graduate education is also good for the advanced student is being called into question. Long range implications will be profound. Labor management relations have been difficult for a variety of reasons:

- There are few administrators (at institutions where graduate students organize) who have much, if any, experience with collective bargaining. Those who do are normally on the "staff" or "non-faculty" side of the house. Non-academic administrators are often unfamiliar or uncomfortable in the deliberative forums where academic policies are set. At some institutions, non-academic administrators with expertise may not be consulted, even when they have broad based knowledge and experience; simply because they lack academic credentials! Productive relations with unions demand certain skills, administrative structures, knowledge of industrial labor relations practices. Senior executives in elite institutions may not be conversant with these processes and may lack faith in those who are. In some cases, in the private sector, legal counsel are brought to campus who may have extensive experience fighting unions in the local lumber mill, machine factory, perhaps a national airline, but have not dealt with craft-type unions in academic environments. Collective bargaining demands a certain degree of hierarchy, control mechanisms, and efficient decision-making processes which are largely absent in the upper echelons of large research institutions.

• The demands of organized graduate student unions go to the very core of conditions attendant to graduate education in academic departments and divisions; e.g., departmental autonomy. Funds to meet increased calls for salaries, stipends, health care supplements, and the like, normally come from academic budget lines. The deliberative processes to react to graduate student needs are often incompatible with collective bargaining practices and procedures. Institutions (and individuals) have a difficult time developing even fundamental objectives; e.g., negotiation parameters. The unionization process breaks down due to many factors but leading the list are the following:

- Many senior administrators and faculty of good will and high ethical standards believe that unionization is incompatible with graduate education and that those organizing are students first, employees second. The individuals to whom I am referring are not necessarily anti-union but believe unions of graduate students are fundamentally incompatible with the faculty-student mentoring relationship. While the important issue of whether or not graduate students do, in fact, meet definitions for employees under state or federal labor relations statutes, is beyond the scope of this paper, the fact remains that in many jurisdictions, graduate students have succeeded in gaining the right to vote (as employees) for union representation. Often, these votes have come years after the university has engaged in a variety of legal maneuvers to deny collective bargaining rights to graduate students. The resulting situation has been to create a more militant and sophisticated group of students willing to affiliate with the UAW or related industrial-type union and who now have little faith in traditional governance processes.

- Those in senior positions have less and less decision making authority (power and influence) to respond to graduate student unionization drives. Decision making in large research universities is inherently political, power is highly diffused. Many competing interest groups cancel out the effective recommendations of select groups or individuals. While a discussion of the organizational characteristics which inhibit effective decision-making strategies is also beyond the scope of this paper, senior executives often find themselves besieged with consultative "processes" and have few tools (and little inclination) to wield the type of decision making authority necessary to respond quickly and effectively to unionization drives. If graduate student unions are beset by a lack of sophistication, it is mirrored in the inability of large systems with competing interest groups to respond effectively to their demands.

• Graduate student unionization is still a relatively new phenomenon. Senior executives and faculty at elite institutions may look over their shoulders at similarly situated colleges and universities. "If it isn't being done at Harvard, Stanford, Chicago, Columbia, or Princeton, it probably shouldn't be done here!" is a common refrain. The evolution of graduate student unionization at the University of California may have an impact, but it is too early to tell.

- Legitimate questions exist regarding the separation of tuition benefits from "wages, hours, and working conditions", the stuff of collective bargaining. Not only are these issues complex, time consuming, and potentially expensive, the "right" committees are often not empowered to finalize policies in these areas. Increasingly the result has been the entrance of third parties, usually from state government, who are influencing the outcome of unionization in the face of institutional inactivity. In the private sector, the protections afforded employers under the NLRA are still sufficient to fend off union drives, rather than forcing anyone to engage in the complex and difficult tasks of separating student and "employee" matters.

CONCLUDING OBSERVATIONS

In my estimation, there are several long term implications of the presence of graduate student unions:

- There appears to be increasing disdain for the shared governance approach, particularly in large research institutions, and a definite desire, on the part of graduate students, to reduce the ambiguity in their employment relationship with the institution. At present, there are many who believe graduate students are used as resources to safeguard the competitive advantage of large research institutions. Said less delicately, organized graduate students may perceive themselves as substitutes for more costly human resources in order to leverage faculty time. There has been overproduction and underemployment of Ph.D.'s in areas that new Ph.D.'s themselves to want to work. This being said, it is difficult to isolate the effects of graduate student unionism from the consequences of other intellectual, political, economic, and social forces that have transformed the academy. For example, institutional transition, falling enrollments, a decline of federal and state funding, increased government regulation, the loss of public confidence in the value of a college degree, the economy, and the continuing influence of state governments and coordinating boards, like collective bargaining, have all impacted the collegiate environment.

- The implications for departmental autonomy (the shining feature of research organizations) associated with scholarly productivity and the general well being of the academic profession, may be profound. If what graduate student unions obtain constitutes a degree of standardization of work expectations, more input into working conditions, uniformity across academic departments, economic security, and campus wide conflict resolution mechanisms (with binding arbitration), then departmental and disciplinary autonomy as it is known now will change significantly. Whether or not this change will effect how research is conducted, scholarly productivity, working conditions of full-time faculty, authority over academic matters and the like, remains to be seen. At the very minimum, the negative press associated with the plight of graduate students at Yale or Michigan may discourage the young scholars from attending those institutions.

• The movement of graduate students to seek representation of organized labor heralds yet another breakdown in the internal organizational fabric of higher education. As the academy becomes more fractionalized and vulnerable to external pressures, internal governance processes breakdown. At many of the institutions where graduate students are unionizing, the full-time faculty (and exempt senior managers) remain the only groups on campus who are not represented for the purpose of collective bargaining. Ultimately, the authority of institutions to react to external pressures and govern themselves will be circumscribed.

• It remains a complex task to discern what administrative strategies and behavior are most appropriate in unionized institutions. Decision makers, from both union and management, have been innovative as they have adopted and adapted collective bargaining to existing institutional structures and processes. Unionization serves as a catalyst for continued organizational change. These changes, in turn, demand new management strategies. For example, structuring the collective bargaining process in order to anticipate varied outcomes appears to be a crucial measure for success. Understanding the technical aspect of negotiations and grasping the essential components and rules of contract administration are important. Simply putting a vice president, dean, or other "experienced" administrator in charge of collective bargaining (none of whom have extensive prior labor experience) or hiring outside labor counsel (who profess great experience with unions, unfortunately never with faculty unions) has been problematic in countless academic organizations. Unfortunately, mistakes made in the initial phases of unionization may not be evident for decades.

• The course of collective bargaining is often determined by institutional conditions in existence before bargaining. Highly adversarial relationships predate the vote for collective bargaining. Once negotiations commence, unions endeavor to incorporate policies and procedures into collective bargaining agreements which reflect each party's understanding of how particular policies or procedures should have operated in more tranquil times.

• Collective bargaining for graduate students will inevitably serve to focus attention on, and in some cases, stimulate action by other non-represented groups of employees. For example, mid-level managers, who remain largely unorganized, may question whether they are also receiving a fair share of economic benefits. Other employee groups may discern that "organized" blocs have greater opportunities to address "employee" needs. The question of the impact of collective bargaining on salaries and promotional opportunities for represented and non-represented employees defies easier answers. Unionization may freeze an institution's capability to address critical human resources issues.

• The individuals responsible for managing the collective bargaining process will continue to shape the process and, as well, the attitudes of others toward

unionization. In this respect, the skills and styles of those assigned to perform this function are important. Leadership in this arena includes factors and variables such as: the ability to legitimize and institutionalize the labor relations process, the ability to articulate labor relations goals to reflect desires and needs of key organizational constituencies (trustees, President, faculty), the ability to take initiative and to respond to unexpected situations, the ability to understand power in organizations and to initiate strategic actions which neutralize administrative opponents and, lastly, the technical and experiential skills to select one course of action over another (when to take a strike, when to come to agreement, etc.).

What we can say with certainty is that the research university in 2050 will look and act differently than the one we know in 2000. However, the University will not be as different as the naysayers predict, nor look as similar to the contemporary university as those who simply dismiss this "latest organizational fad" suggest. The truth lies somewhere in between.

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ENDNOTES

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[1] In this article, graduate students may also refer to; readers, lecturers, tutors, and teaching assistants.

[2] Gumport, et al.

[3] Gumport, et al. D. Julius (ed.), *Managing the Industrial Labor Relations Process in Higher Education* (Washington, D.C.: College and University Personnel Association, 1995). Hurd, R., et al., *Directory of Faculty Contracts and Bargaining Agents in Institutions of Higher Education*, Vol. 23, National Center for the Study of Collective Bargaining in Higher Education and the Professions, City University of New York, 1997.

[4] See the current *Directory*, published by the National Center for the Study of Collective Bargaining in Higher Education and the Professions at Baruch College, City University of New York.

[5] The distinction of "recognized" and "unrecognized" in the labor-management context is real. By recognition, we mean a certified bargaining unit (by a state agency, the NLRB, or through employer recognition) recognized by the university as the legitimate and legal representative of unit members. Simply being

VI. HUMAN RESOURCES ISSUES

A. Arbitration of Faculty Statutory Employment Claims: Lessons from the Corporate Sector

B. The Arbitration of Faculty Disputes ADA, ADEA and FMLA

C. Pension and Benefit Issues Update Presentation

HUMAN RESOURCES ISSUES

A. ARBITRATION OF FACULTY STATUTORY EMPLOYMENT CLAIMS: LESSONS FROM THE CORPORATE SECTOR

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The U.S. Supreme Court's 1991 decision in *Gilmer v. Interstate/Johnson Lane* stimulated a movement among many U.S. employers to require employees, either as a condition of accepting employment or as a condition of being retained, to sign agreements that required them to submit all employment disputes, including statutory claims, to an arbitral forum, thereby waiving their right to a judicial forum for all such disputes. These "mandatory arbitration agreements" have been controversial, unleashing a firestorm of both litigation and publication. While most federal courts have enforced such clauses for nonunionized employees, only a few have done so for unionized employees if the claims are statutory rather than contractual. This paper examines the development of these two trends, examines a recent decision of the U.S. Supreme Court that sheds relatively little light on the issue, and then proposes a process for responding to the numerous criticisms of these agreements.

Prior to *Gilmer*, the few courts that were asked to enforce mandatory arbitration agreements involving nonunion employees with statutory claims refused to do so. They relied on *Alexander v. Gardner-Denver* (1974), in which the Supreme Court had ruled that a union could not waive an individual employee's right to pursue individual statutory employment claims in a judicial forum simply by negotiating an arbitration clause with the employer. Because there had been no individual waiver of rights under such laws as Title VII of the Civil Rights Act of 1964 or the Age Discrimination in Employment Act, the Court said, the unionized employee was free to pursue statutory claims under the collective agreement's arbitration clause, in court, or both.

Because the Supreme Court did not overrule *Gardner-Denver* in its 1991 *Gilmer* decision, federal courts asked to preclude employees from litigating statutory claims have tended to enforce arbitration agreements contained in an individual employment (or other) agreement, but to allow the litigation to proceed when the agreement is part of a collectively bargained contract. Only one federal

circuit has explicitly ruled that mandatory, pre-dispute arbitration agreements violate the law; the rest have ruled that such agreements are enforceable, although some circuits require more specificity in the agreement than do others.

POST *GARDNER-DENVER* TRENDS FOR UNIONIZED EMPLOYEES

Until 1996, the federal courts were relatively consistent in following *Gardner-Denver* and refusing to preclude employees from litigating statutory employment claims when the arbitration agreement appeared in the collective bargaining agreement, but there was no explicit individual waiver. However, in 1996 the U.S. Court of Appeals for the Fourth Circuit ruled in *Austin v. Owens-Brockaway Glass Container Inc.* that collective bargaining agreements to arbitrate employment disputes were binding upon individual employees even if no individual waiver had been executed. That same circuit ruled similarly in *Wright v. Universal Maritime Service Corp.* in 1997. Given the conflict between this circuit and all others, and the Fourth Circuit's defiance of the *Gardner-Denver* precedent, the U.S. Supreme Court agreed to review *Wright*.

In *Wright v. Universal Maritime Corporation* (1998), the Supreme Court was asked to determine whether an arbitration clause in a longshoreman's collective bargaining agreement limited him to an arbitral forum in seeking a remedy for an alleged violation of the Americans With Disabilities Act. The Court, in a unanimous opinion written by Justice Scalia, determined that the arbitration clause in the collective bargaining agreement did not provide for a "clear and unmistakable waiver" of bargaining unit members' ability to redress alleged statutory violations in a judicial forum. Although the Court acknowledged the tension between *Gardner-Denver* and its progeny and the more recent *Gilmer* and its progeny, the Court found it unnecessary to determine whether the waiver in the collective bargaining agreement was valid because the waiver was neither clear nor unmistakable with respect to individual statutory rights. Furthermore, said the Court, the presumption of arbitrability created in the Steelworkers Trilogy[2] does not extend to the resolution of statutory claims, but only to the resolution of claims arising out of the collective agreement. While the Court hinted that *Gilmer* could have overruled *Gardner-Denver*'s "seemingly absolute prohibition of union waiver of employees' federal forum rights," it declined to address that issue because the waiver at issue was too general. Nor did the Court address the issue of whether a union could waive an individual's statutory right to a judicial forum if that waiver met the Court's standards for clarity and specificity.

The Court's refusal to address several significant issues in *Wright* leaves more uncertainty than clarity. The Court neither overruled *Gardner-Denver nor* affirmed its continuing vitality, as commentators had anticipated (Delikat and Kathawala 1998); therefore it would appear that *Gardner-Denver* is still good law. But the Court's focus on the language of the waiver in the collective bargaining agreement suggests that, given more specific language, the Court might have upheld the Fourth Circuit, distinguishing between a *Gardner-Denver* situation in which the arbitration clause is very general and thus cannot constitute a clear

waiver, and a very clear and specific waiver in a collective bargaining agreement that the Court hinted that it might have enforced.

But the Court's rejection of the presumption of arbitrability for statutory claims, as opposed to contractual claims, suggests that it might look less favorably on individual arbitration agreements that were nonspecific. Although dicta, these words may have great significance for cases now at the federal appellate level, and suggest that the middle ground that one federal circuit court has taken may find favor at the Supreme Court level if it decides to review a challenge to an individual arbitration clause in an employment contract.

GILMER AND ITS PROGENY

Although the agreement to arbitrate in *Gilmer* was not contained in an employment contract, but in a registration statement for a securities dealer, federal trial and appellate courts (with one exception) have held that *Gilmer* applies to individual employment contracts as well. Although nearly all of the federal appellate courts have ruled that mandatory arbitration agreements in employee contracts, handbooks, or applications are enforceable,[3] they differ widely on the issues they consider. For example, while some courts explicitly address whether the Federal Arbitration Act precludes the arbitration of employment disputes,[4] many others do not.

One federal appellate opinion that carefully and thoroughly examined the FAA issue, as well as a variety of others, is *Cole v. Burns International Security Services* (1997), a decision from the U. S. Court of Appeals for the District of Columbia Circuit. The opinion is particularly noteworthy because it was written by Judge Harry Edwards, a former labor arbitrator and labor law scholar, who expended considerable time and effort discussing the differences between the role of arbitration in resolving contractual claims as opposed to statutory claims. In particular, Judge Edwards rejected the argument that courts should defer to arbitration awards when they involve statutory claims in the way that is done with the arbitration of contract claims, saying "the courts will always remain available to ensure that arbitrators properly interpret the dictates of public law" (p. 1469). While the arbitrator who decides an dispute under a collective agreement is an "alter ego" for the parties to the agreement, said Judge Edwards, an arbitrator who resolves statutory claims is acting as a private judge, and is neither chosen by nor accountable to the public. Furthermore, said Judge Edwards, the concerns expressed by the Court in *Gardner-Denver*--that the employee would be required to permit the union to argue the case and develop the strategy--demonstrate that the interests of the union and the individual employee may not always be coterminous. But given the Court's ruling in *Gilmer*, the court will enforce an arbitration agreement that involves statutory claims if the agreement merely waives the individual's right to a jury rather than waiving substantive rights or the right to a neutral forum. Since the arbitration agreement at issue in *Cole* provided for neutral arbitrators, provided for "more than minimal" discovery, required a written award, provided for all forms of relief that a court could award under the

statute, and did not require the employee to pay unreasonable costs or fees, the court upheld the agreement.

Although the number of cases and the variety of issues they address are too numerous to address in this paper, an examination of three cases that represent both polar extremes and a middle ground, and that analyze the same type of arbitration clause, should provide an overview of the differing viewpoints of the advocates and of the courts as well. As of this writing, the Supreme Court has not agreed to review any of the cases, whether they involve a collective bargaining agreement or an individual employment contract, in which certiorari has been sought.

MANDATORY ARBITRATION AGREEMENTS VOILATE TITLE VII

In *Duffield v. Robertson Stephens & Company* (1998), a decision of the U.S. Court of Appeals for the Ninth Circuit, the court held that the Civil Rights Act of 1991, which amended Title VII, forbids mandatory arbitration of statutory claims, but permits voluntary, post-dispute arbitration agreements.[5] The plaintiff had been required to sign the Uniform Application for Securities Industry Registration or Transfer (known as the U-4 form). This was the same form that was at issue in *Gilmer*, which the Supreme Court had upheld as a valid waiver of access to a judicial forum. The court examined the language of section 118 of the Civil Rights Act of 1991 as well as its legislative history. Section 118 states: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution including . . . arbitration is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this Title." The court interpreted that language to refer to post-dispute, voluntary agreements to arbitrate. And although *Gilmer* was decided prior to the passage of the Civil Rights Act of 1991, the Ninth Circuit stated that application of *Gilmer* to Title VII claims was an "open question" (as, at the Supreme Court level at least, it still is). The court believed that Congress was referring to *Gardner-Denver* rather than to *Gilmer* when it drafted the language "authorized by law."

Turning to the legislative history of the Civil Rights Act of 1991, the court noted that the Report of the House Committee on Education and Labor accompanying the bill that became the Civil Rights Act of 1991 included language that encouraged alternative dispute mechanisms as a supplement to rather than a replacement for, statutory remedies, stating clearly that such an agreement "does not preclude the affected person from seeking relief under the enforcement provisions of Title VII" (House Report No. 40 (I) at 97, quoted in *Duffield* at 1196). Furthermore, the Committee Report noted that Congress had rejected a proposal that would have permitted the mandatory arbitration of Title VII claims, stating that "[s]uch a rule would fly in the face of Supreme Court decisions holding that workers have the right to go to court, rather than being forced into compulsory arbitration, to resolve important statutory and constitutional rights, including equal opportunity rights" (House Report at 104). The court concluded that section 118 of the Act was intended to expand claimants' choice of fora rather than to narrow it.

The U.S. Supreme Court denied certiorari in *Duffield*, which leaves the Ninth Circuit alone in rejecting mandatory arbitration of statutory claims, while every other circuit that has addressed the issue has permitted it. Furthermore, several federal appellate courts have explicitly rejected the reasoning in *Duffield*, ruling that the Civil Rights Act does not preclude, nor prohibit, mandatory arbitration of Title VII claims.

MANDATORY ARBITRATION AGREEMENTS ARE ENFORCEABLE

Three months after the Ninth Circuit's decision in *Duffield*, the U.S. Court of Appeals for the Third Circuit issued a ruling in *Seus v. John Nuveen & Co.* (1998). The plaintiff in *Seus* had also signed a U-4 form that contained the same broad arbitration language as that addressed in *Duffield*. The court rejected the plaintiff's argument that the Civil Rights Act of 1991 (Title VII) and the Older Workers Benefit Protection Act (which amended the Age Discrimination in Employment Act) should be interpreted as precluding mandatory arbitration of claims under these two statutes. Relying on *Gilmer*, the court rejected the plaintiff's contention that ADEA claims could not be subject to mandatory arbitration, since the ADEA was at issue in *Gilmer*. Similarly, the court rejected the plaintiff's reading of the Older Workers Benefit Protection Act and the Civil Rights Act of 1991 to preclude mandatory arbitration. Given that the court had already determined that the Federal Arbitration Act's exclusion of employment contracts applied only to employees in the transportation industry, the court ruled that language in the legislative history of the Civil Rights Act of 1991 could not repeal the Federal Arbitration Act. In fact, the Third Circuit interpreted the language of Section 118 of the Civil Rights Act, "to the extent authorized by law," to refer to the FAA rather than to either *Gardner-Denver* or *Gilmer*. The court also rejected the plaintiff's claim that the arbitration process used by the National Association of Securities Dealers was inadequate to protect her statutory rights, saying that the Supreme Court had recognized the adequacy of the NASD's procedures in *Gilmer* and that further inquiry was unnecessary.

Duffield and *Seus* involve very similar facts and identical arbitration clauses, yet the two reviewing courts reached opposite conclusions. They clearest conflict is in their reading of Section 118 of the Civil Rights Act of 1991. A better approach might be that suggested in *Cole*, in which the court approves the use of mandatory arbitration clauses for enforcing statutory rights, but only if the agreement is clear and procedural protections are in place. A third federal appellate case seems to suggest a middle ground between the two extremes of *Seus* and *Duffield*.

MANDATORY ARBITRATION AGREEMENTS ARE VALID IF CLEAR

In *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998), the U.S. Court of Appeals for the First Circuit reversed a trial court's ruling that both Title VII and the Older Workers Benefit Protection Act precluded mandatory arbitration of claims arising under these laws,[6] although it did refuse to enforce the particular arbitration agreement at issue because it was too broad and nonspecific.

The plaintiff had been required to sign the Uniform Application for Securities Industry Registration or Transfer (known as the U-4 form), which contained a broad arbitration agreement.[7] It was also the same agreement at issue in *Duffield* and *Seus*. At the time the plaintiff signed the U-4 form, she was given a copy of the employer's personnel manual, but there was apparently nothing in the handbook that explained what types of disputes were covered by the U-4 form. Nor did any employer representative explain to the plaintiff the significance of her signature on the U-4 form, and she was not given a copy of the New York Stock Exchange Rules, which specify the types of disputes that are covered by the arbitration clause.[8]

The First Circuit rejected the reasoning of *Duffield*, stating that the language of section 118 of the Civil Rights Act did not overcome the presumption of arbitrability, and that the "authorized by law" language should be interpreted to apply to *Gilmer* rather than to *Gardner-Denver*. The First Circuit acknowledged the language in the House Committee report relied upon by the Ninth Circuit in *Duffield*, but again stated that the legislative history was "insufficient to overcome the presumption in favor of arbitration which *Gilmer* establishes (p. *23). Furthermore, said the court, since neither the language of the Civil Rights Act of 1991 nor its legislative history show an intent to preclude pre-dispute arbitration agreements, and since Title VII and the ADEA (which was at issue in *Gilmer*) are similar remedial legislation, there was no reason to refuse to apply *Gilmer*'s acceptance of mandatory ADEA arbitration to Title VII claims. Because the right to a judicial forum is not a substantive right, said the court, (citing the Supreme Court's opinion in *Wright*), the waiver provisions of the Older Workers Benefit Protection Act did not render the arbitration agreement invalid.

But the court was more sympathetic to the plaintiff's claim that the arbitration agreement should not be enforced because the waiver was not an informed one. Although the court rejected the plaintiff's arguments that the U-4 form was an adhesion contract and that inequality of bargaining power between the employee and the employer made the agreement unenforceable, it did agree to apply common law contract interpretation principles to the agreement. The court ruled that the arbitration agreement was "incomplete" because it did not define the range of claims subject to arbitration. The language of the U-4 referred to claims that were required to be arbitrated by the New York Stock Exchange rules, but the employer could not prove that it had given the plaintiff a copy of those rules, and she asserted that she had never received them, as the U-4 form specifically required. Because the waiver was not express it could not be a knowing waiver, which made it unenforceable. The First Circuit then cited the Supreme Court's opinion in *Wright*, but noted that the high Court had made a careful distinction between arbitration clauses in collective bargaining agreements and those contained in individual agreements, saying, in dicta, "a lesser standard than 'clear and unmistakable' applies to private agreements" (p. *60) without explaining why the standard in individual agreements would be lower.[9]

The sharp divergence between the Ninth Circuit and its sister circuits, and the very narrow ruling by the U.S. Supreme Court in *Wright*, leaves employers and

employees with substantial uncertainty. *Wright* hints, but does not declare, that explicit waivers may be enforceable, even in collective agreements. Neither *Gilmer* nor *Gardner-Denver* has been either overruled or explicated by the Court. With numerous issues remaining to be resolved by the Supreme Court (such as whether the Federal Arbitration Act even permits arbitration of employment disputes in the first place), the parties need to develop alternative dispute resolution mechanisms that are perceived as fair to both sides and that comport with the spirit of the civil rights statutes.

ENHANCING THE FAIRNESS OF MANDATORY ARBITRATION AGREEMENTS

Mandatory arbitration agreements in individual contracts have been sharply criticized by the EEOC, the National Labor Relations Board, the American Civil Liberties Union, and the National Employment Lawyers' Association, among others. The EEOC has issued a Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment (July 10, 1997) in which it rejected the use of these agreements unless they were completely voluntary and entered into only after the dispute had arisen (EEOC 1997). In addition, the Commission on the Future of Worker-Management Relations (known as the "Dunlop Commission") took the position that mandatory arbitration of statutory disputes was not appropriate unless it had a number of procedural safeguards.[10] Many plaintiffs have asserted that such agreements are contracts of adhesion because they are required to sign them as a condition of employment, and no negotiation over their terms is permitted.[11]

The EEOC faults the arbitration process for its lack of public accountability, its ability to ignore judicial precedent, the fact that the public is not involved in the selection of arbitrators (as it is in the selection of judges), the lack of written opinions, or opinions that are not disclosed to the public, the narrow standard of judicial review, limitations on discovery, the lack of ability to pursue a class action, and the difficulty of observing possible patterns of discrimination by a particular employer because each case is decided in isolation. Furthermore, according to the EEOC, because the employer is a "repeat player," while the complainant is usually a "one-shot player," the employer is in a better position to select an arbitrator, and the fact that the employer is in a position to select an arbitrator in the future may bias the arbitrator in the employer's favor. In addition, the EEOC believes that mandatory arbitration agreements adversely affect its ability to enforce the civil rights laws because employees bound by mandatory arbitration agreements may not be aware that they may still file discrimination claims with the EEOC. Even those who are aware that they retain this right may be discouraged from filing claims, says the EEOC, since they will not be able to pursue these claims in court. Other concerns of the EEOC are that hearings may be conducted by arbitrators given no training and possessing no expertise in employment law, that mandatory arbitration usually does not permit plaintiffs to receive punitive damages and attorneys' fees to which they would otherwise be entitled under the statute, and may force plaintiffs to pay exorbitant "forum fees"

in the tens of thousands of dollars, discouraging aggrieved employees from seeking relief.

Numerous scholars have recommended a variety of procedural safeguards that should enhance the fairness of mandatory arbitration agreements. One important source of procedural fairness is the American Arbitration Association's National Rules for the Resolution of Employment Disputes (June 1, 1996). These rules provide for joint selection of the arbitrator, discovery, a written award, the same remedies as are available in court, and a variety of other protections. These protections have been endorsed as the minimum necessary to provide for a process that is perceived as fair by both parties (Bales 1997). Although most of these procedural protections are available to employees covered by collective bargaining agreements, some are not: remedies in contract arbitration are far narrower than statutory remedies, for example. Therefore, the following suggestions, culled from cases involving both collective bargaining agreements and individual agreements, should help make arbitration agreements in collective bargaining contracts as well as in individual employment contracts more likely to be enforced.

INCLUDE A CLEAR, SPECIFIC WAIVER

Given the outcome in *Wright* and the argument by the First Circuit in *Rosenberg*, it seems obvious that arbitration clauses, whether they appear in collectively-bargained agreements or in individual agreements, will need to specify that they cover employment disputes and they apply to claims brought under specific statutes. For nonunionized employees, it would probably be helpful for employers to follow the requirements of the Older Workers Benefit Protection Act with respect to waivers. These requirements provide for specificity in the type of claims that the employee is being asked to waive, an agreement written in language that the employee can understand, a 21-day period to allow the employee to consider whether or not to sign, a 7-day revocation period, and the requirement that the employer notify the employee that she or he should seek legal review, among others.[12] Given the uncertain status of *Gardner-Denver* and the language of *Wright*, it is not clear whether a very specific waiver in a collective bargaining agreement would overcome *Gardner-Denver*'s presumption against waiver by a union, but it would certainly improve an employer's chances of having a court dismiss a discrimination lawsuit.

With respect to individual arbitration agreements, some commentators recommend a subjective test (whether the employee actually understood what rights he or she was waiving) ("Developments in the Law" 1996, 1683-4). However, a clear, specific agreement that referred to employment disputes and stated all the laws that the agreement covered would probably be upheld as a knowing waiver even if the employee later claimed not to have understood it.[13]

PROVIDE FOR STATUTORY REMEDIES

Although one advantage of the arbitration agreements in collectively-bargained contracts is that the process is far more simple than litigation and the remedies are limited, limiting remedies may not be a wise strategy for parties that wish to confine unionized workers to an arbitral forum for statutory claims. Confining arbitrators to equitable, or make-whole, remedies allows the employee to seek judicial determination of whether additional remedies provided for by the statute should be awarded. Arbitrators' awards tend to be lower than juries' (Bompey and Pappas 1993-4, p. 208), and it is unlikely that the large punitive damage awards given by juries would be ordered by arbitrators. Particularly with respect to arbitration clauses in collective bargaining agreements (which still must comply with *Gardner-Denver*), providing for the full array of statutory remedies for discrimination claims will strengthen the employer's defense of their enforceability.

REQUIRE THAT ARBITRATORS BE TRAINED IN EMPLOYMENT LAW

An early report by the General Accounting Office (1994) criticized employment arbitration in the securities industry on a number of grounds, but one major issue was the lack of employment law expertise of the arbitrators. The securities industry used its normal panel of arbitrators who were skilled in securities law and practice but who had little exposure to employment discrimination jurisprudence. The Dunlop Commission has also recommended that arbitrators receive specific training in employment law, rather than simply requiring arbitrators "experienced" in interpreting and applying employment law.[14] Given its statutory obligation to enforce the nondiscrimination laws, and its recent focus on alternate dispute resolution for resolving discrimination claims, the EEOC would appear to the appropriate source of this training.

PROVIDE FOR LIMITED JUDICIAL REVIEW

Judge Edwards stated clearly in *Cole*, and the Supreme Court agreed in *Wright*, that deference to arbitration of statutory claims is much weaker than deference to arbitration awards in contractual disputes. One of the strongest criticisms of mandatory arbitration agreements is the lack of access to a judicial forum to ensure that the law has been applied correctly. Judicial review could be limited to the arbitrator's application of the law, and fact-finding would be reviewable only under the "clearly erroneous" standard. This method is used by federal courts, which employ magistrates as factfinders and reserve to the judge the primary responsibility of interpreting and applying the law. Given the fact that the employee would already have paid part of the cost of the arbitration, and would incur hefty legal fees in seeking judicial review, allowing such review would probably not result in every arbitration award being appealed. Given the fact that the current lack of judicial review has resulted in numerous pre-arbitration lawsuits that are costly for the employer to defend, allowing post-

arbitration judicial review, limited to review of the application of the law, could reduce litigation.

CONCLUSION

Despite the continuing avalanche of lawsuits challenging employers' use of mandatory arbitration agreements, and the continuing criticisms by legal scholars and federal agencies (Motley 1998; Finkin 1996), they are unlikely to disappear. And the use of arbitration to resolve disputes arising under a collectively bargained agreement is a key feature of most such contracts. Furthermore, more than half of the states have adopted the Uniform Arbitration Act of 1955, which expressly permits the arbitration of employment contracts; other states have adopted their own arbitration provisions (Buse 1995, p. 1490 and n. 20).

Despite the sizable number of challenges to mandatory arbitration clauses in individual agreements and the nearly consistent approval of such agreements by the federal judiciary, federal courts must respond to each individual challenge to the validity of arbitration clauses (although more are doing so by awarding summary judgment). Providing enhanced procedural and substantive safeguards should both reduce challenges to these clauses in the first place, and provide for swifter and simpler summary judicial review for those challenges that are litigated (Turner 1996).

Given these realities, employers and unions need to construct arbitration agreements that retain the benefits of arbitration (efficiency, speed, low cost) while providing safeguards that currently are absent from many individual agreements, and some of which are currently unavailable to unionized employees as well. Unless and until the U.S. Supreme Court speaks with greater specificity regarding these agreements, constructing agreements that are perceived as fair by both parties should encourage reviewing courts to uphold the agreements as well as reducing judicial challenges to their enforceability.

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ENDNOTES

[1] The author acknowledges with thanks the research assistance of Debra Casey, a Ph.D. candidate at Rutgers University.

[2] United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v American Mfg. Co.,363 U.S. 564 (1960); and United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

[3] See, for example, *McWilliams V. Logicon*, 143 F.3d 573 (10th Cir. 1998); *Rojas v. TK Communications, Inc.*, 87 F.3d 745 (5th Cir. 1996); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (8th Cir. 1997); *Mouton v. Metropolitan Life Insurance Co.*, 147 F.3d 453 (5th Cir. 1998), *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054 (11th Cir. 1998); and *O'Neil v. Hilton Head Hospital*, 115 F.3d 272 (4th Cir. 1997).

[4] Section 1 of the Federal Arbitration Act excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" (9 U.S.C. sec. 1 (1994)). Although numerous plaintiffs have argued that this language thus excludes all employees working in any organization that is engaged in interstate commerce, most courts have rejected that interpretation and have limited this language to employees in the transportation industry.

[5] Although the plaintiff also argued that she did not voluntarily waive her right to litigate statutory claims in the securities registration agreement that she signed, the court did not address this issue because it decided that Title VII precludes such agreements as a matter of law.

[6] The court also reversed the trial court's ruling that the New York Stock Exchange's arbitral forum was infected with such "structural bias" that it was not an adequate forum for the resolution of such claims.

[7] Merrill Lynch subsequently reached a settlement in a different lawsuit in which it promised not to enforce the language in the U-4 form for employment discrimination disputes. *Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 96C 3773 (N.D. Ill. Sept. 2, 1998). Furthermore, the National Association of Securities Dealers received approval from the Securities and Exchange Commission to exempt employment discrimination claims from the arbitration provisions of the U-4 form (63 Fed. Reg. 35,299 (1998)). The New York Stock

Exchange has also sought the SEC's repeal of a similar rule; at the time of this writing the request was still pending.

[8] It is not clear whether the plaintiff in *Seus* made the argument that she had not received a copy of the NASD rules. She had, however, argued that the rules did not specifically address employment disputes when she signed the U-4 form in 1982. The court ruled that, because other courts had found that the broad language of the rules ("any dispute, claim or controversy arising out of or in connection with the business of any member of the [NASD] . . .") could be interpreted to include employment disputes, she should have understood the language to include employment disputes.

[9] The court said that there should be "some minimal level of notice to the employee that statutory claims are subject to arbitration" (p. *61). The court also rejected the recommendation by various courts and commentators that a subjective standard (whether the employee actually understood what rights he or she was waiving) be used. If the plaintiff had been given a copy of the rules, said the court, the arbitration agreement would have been enforceable, even if she had not read them.

[10] The Commission stated that the arbitrator should be neutral and should understand the laws under which the dispute was brought; that the employee should have access to the information necessary to present the claim; that a fair system of cost-sharing be used; that the employee have the right to independent representation; that the same remedies be available as those available in litigation; that the arbitrator's award be written; and that judicial review be available to "ensure that the result is consistent with the governing laws" (quoted in *Cole* at 1483, note 11).

[11] This argument has been unsuccessful. Even in the few cases in which the court refused to enforce the arbitration agreement, the ruling was not based on a finding that the agreement was a contract of adhesion. Courts that have expressly reviewed this claim have rejected it (Bompey and Stempel 1995, p. 30).

[12]29 U.S.C. sec 626(f)(1).

[13]Courts typically enforce an agreement against a party who signed it because the law presumes that one only signs an agreement if one understands its meaning.

[14] Commission on the Future of Worker-Management Relations, Report and Recommendations, p. 31.

B. THE ARBITRATION OF FACULTY DISPUTES ADA, ADEA and FMLA

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I. FEDERAL FAMILY AND MEDICAL LEAVE ACT OF 1993

The Federal Family and Medical Leave Act of 1993 ("FMLA") became effective in 1994 and covers all public employers and private employers who are engaged in interstate commerce and employ fifty or more people within a 75-mile radius for 20 consecutive weeks.

FMLA requires an employer to allow an employee to take a leave of absence of up to 12 weeks of unpaid leave during any 12-month period for qualifying reasons. To qualify, an employee must have worked for the employer for at least 12 months and must have worked at least 1250 hours for the employer in the last 12 months. In determining the 12 month period, the employer may choose the calendar year, any fixed 12-month "leave year" such as a fiscal year, a prospective 12-month period from when the employee's FMLA leave began or a "rolling 12-month period measured retroactively from the date the employee uses any FMLA leave.

Serious Health Condition

The FMLA leave can be taken for any "serious health condition" that makes the employee unable to perform the functions of his or her position. It can be taken for the birth or adoption of a child, or the placement of a foster child. Leave also can be taken to care for the employee's spouse, son or daughter, or parent with a serious health condition defined by the Act, is "an illness, injury, impairment, or physical or mental condition that involves in-patient care (i.e., an overnight stay) at a hospital, hospice or residential health care facility; or continuing treatment by a health care provider." A serious health condition involving continuing treatment by a health care provider includes any one or more of the following: 1) a period of incapacity (i.e., inability to work, attend school or perform regular activities)) for more than three consecutive calendar days; b) treatment two or more times by a health provider; c) a single treatment by a health

care provider which resulted in a continuation of treatment; d) a period of incapacity due to pregnancy; e) incapacity due to a chronic serious health condition (i.e., requires periodic visits for treatment or continues over an extended period of time).

Court interpretations of FMLA have generally held that an essential element of a serious health condition is a showing of incapacity. For example, in *Brannon v. Oshkosh B'Gosh, Inc.,* 819 F. Supp. 1028 (MD Tenn, 1995), the court held that the employee's condition did not require FMLA leave because she was not incapacitated for more than three calendar days, but her daughter's fever qualified because it kept her from day care.

The serious health condition must be evident at the time the need for the leave arises as opposed to potential illness.

Occasional illness such as viruses, infections etc. are evaluated by the courts on a case by case basis. In *Price v. City of Fort Wayne,* 117 F.3d 1022 (7th Cir. 1977), the Court concluded that a "an assemblage of diagnoses," including elevated blood pressure, back pain, headaches, et. al., could collectively constitute a serious health condition under the FMLA. To qualify as a serious health condition, the employee must be unable to perform one or more of the essential functions of the job.

NOTICE TO EMPLOYER

Although employees are not required specifically to mention FMLA when requesting leave, they are required to give the employer clear notice that (s)he intends to take leave pursuant to FMLA. If the need is foreseeable, notice of the leave should be made 30 days in advance; otherwise, the employee must notify the employer "as soon as practicable. " The employee should provide the employer with sufficient information to put the employer on notice that the leave is FMLA-qualifying, but what constitutes sufficient information is not settled in the courts. Whereas the court in *Carter v. Ford Motor Co.,* 121 F.3d 1146 (8th Cir. 1997), found a telephone call that the employees (husband and wife) would be out sick with personal family problems and did not know when they would return to be insufficient notice. But in *Price, supra* the employee's completion of a leave form indicating the need for medical leave with a doctor's note attached was deemed sufficient notice.

NOTICE TO EMPLOYEE

FMLA requires employers to notify employees of their rights by posting a notice in a conspicuous place summarizing the provisions of the law. Courts have interpreted the regulation as precluding an employer who failed to post the notice from taking adverse action against an employee, including denying FMLA, when the employee failed to provide advance notice. The case law is split as to whether the employer's failure to provide notice would entitle the employee to greater leave than provided under the statute.

The employer bears the burden of designating leave, either paid or unpaid, as FMLA leave. The employer may require the employee to use accrued paid leave with available unpaid FMLA leave. However, the substitution of sick leave/medical plan leave may only be made when the employer's medical plan makes such provisions. Short-term disability leave may also be designated as FMLA leave.

HEALTH CARE PROVIDER'S CERTIFICATION

Section 2613 of the FMLA allows the employer to request medical certification to ensure the validity of the employee's request for FMLA leave. An employer who questions the validity of a medical certificate may request a second opinion and if there is conflict between the first and second opinions, a third opinion from a mutually selected doctor can be obtained at the employer's expense. However, the employee bears the responsibility of establishing that his or her leave is FMLA qualifying and until the medical certificate confirms the employee's eligibility, the employer may treat the absences as non-qualifying, conceivably subjecting them to discipline. In short, the medical certification process enables the employer to minimize FMLA leave abuse.

CONTINUATION OF HEALTH INSURANCE

While the employee is on FMLA leave, (s)he is entitled to a continuation of health insurance, however, the employee may be required to pay the same share of the premiums for heath insurance during the period of the leave.

INTERMITTENT OF REDUCED LEAVE SCHEDULES

The FMLA allows an employee to take leave intermittently (for a few days or few hours) or on a reduced work schedule when "medically necessary" to care for a family member or attend to the employee's serious health condition. Intermittent leave or reduced leave, which is often used to schedule appointments or medical treatment, is deducted from the total amount of leave that can be taken by the employee. Case law indicates that employees must make reasonable efforts to avoid disruptions of the workplace, and a failure to adjust appointments to that end could subject them to discipline, including termination [See *Kaylor v. Fannin Regional Hospital, Inc.*, 946 F. Supp. 988 (ND Ga.1996)].

RIGHT OF REINSTATEMENT TO THE SAME OR EQUIVALENT POSITION

An employee who has taken FMLA leave is entitled to his or her same or equivalent position after the leave period expires. This has been construed as a job with substantially equivalent skills, duties and authority. However, if the employment decision was made before the employee took leave (e.g. reduction in force/reorganization), then the employee would not necessarily be entitled to a "virtually identical" position. Finally, an employee who is unable to perform the

essential functions of their position after 12 weeks of FMLA leave may be entitled to a reasonable accommodation under the ADA.

II. AMERICANS WITH DISABILITIES ACT OF 1990

The ADA became effective on July 16, 1962 and does not apply retroactively. It contains five titles that create rights for persons with disabilities and covers private sector employment, state and local governments and their instrumentalities. The term disability is defined in the law as:

1. a physical or mental impairment that substantially limits one of more of the major life activities of an individual;

2. a record of such impairment; or

3. being regarded as having such an impairment. (This definition is comparable to the term "individual with handicaps" in the Rehabilitation Act of 1973).

4. "Physical or mental impairment" includes physiological disorders, cosmetic disfigurements, or anatomical losses affecting a body system, as well as mental or psychological disorders and specific learning disabilities."

INABILITY TO WORK

An employee seeking to establish him/herself as "disabled" is generally required to demonstrate that 1) (s)he has a mental or physical impairment; and 2) the impairment substantially limits one or more major life activities. The regulations promulgated by the EEOC have defined "physical or mental impairment" as follows: Any physiological disorder, or condition, cosmetic disfigurement, anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, endocrine; or any mental or physiological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

MAJOR LIFE ACTIVITY

An inability to work may be an impairment of a major life activity as long as the impairment results in a general inability to work, rather than an inability to perform a specific job. To establish that the impairment "substantially limits" a major life activity. The individual must establish that (s)he is unable to perform a major life activity that the average person in the general population can perform; or significantly restricted as to the condition, manner or duration which the individual can perform the major life activity as compared to the average person.

The courts are split regarding whether certain activities are major life activities. Infertility and pregnancy are areas of conflicting opinion. Mental disabilities have sometimes been held not to be disabilities, under the ADA. For example, in *Lewis v. Zilog, Inc.* 908 F. Supp. 931 (ND Ga. 1995) a plaintiff with a bipolar disorder was not a qualified person since the disorder rendered the employee unable to perform the essential functions of her job. Also, carpal tunnel syndrome, which only limits performance of a narrow range of work activities, is not a disability even if it is a permanent impairment.

MITIGATING MEASURES

The courts are also divided as to whether the ADA applies to an individual whose disability is completely controlled by medication. In *Coghlan v. H.J. Heinz,* 851 F. Supp. 808 (ND Texas, 1994), an insulin controlled diabetic was found to be protected by ADA because he would be "substantially limited" if he stopped using insulin. There is a continuing debate as to whether the individual's use of mitigating measures to alleviate or eliminate the symptoms of the impairment (e.g. corrective lenses to correct a vision impairment) diminish or remove the substantial impairment, despite EEOC guidelines to the contrary. In *Gilday v. Mecosta County,* 124 F.3d 760 (6th Cir. 19979), the Court held that mitigating measures" should be taken into account when determining whether an individual is "substantially limited" from performing a major life activity. This issue, currently before the U.S. Supreme Court, involves the extent to which a person who uses mitigating measures such as: treatment, medication or other corrective devices to alleviate or eliminate an otherwise disabling condition can be considered "substantially" limited from performing a major life activity. In *Sutton v. United Airlines*, No. 97-143, the Court will decide whether twin sisters who are nearsighted but with vision correctable to 20/20 were improperly denied employment as pilots because they did not meet the airlines' requirement for uncorrected vision. Another case, *Murphy v. United Parcel Service*, No. 976-1992, involves a mechanic with high blood pressure corrected with medication.

"Disability" does not include such things as: homosexuality, bisexuality, transvestitism, sexual behavior disorders, compulsive gambling, substance abuse, or disorders resulting from the current use of illegal drugs.

"Regarded as impaired" is aimed at protecting individuals with stigmatic conditions, which do not substantially limit a major life activity (e.g. severe burn).

COVERED INDIVIDUALS

"Qualified individuals with disabilities" are those individuals who satisfy the prerequisites of the position and who can perform the essential functions of the position with or without reasonable accommodation. Covered individuals include those who have been rehabilitated and no longer use illegal drugs as well as those erroneously perceived to be engaged in such use. An alcoholic may be qualified individual so long as (s)he does not use alcohol at the workplace or is under the influence of alcohol at the workplace. In addition, an otherwise covered

individual cannot be discriminated against for their association or relationship with a person who has a disability (*nota bene*: the EEOC takes the position that HIV-positive status is a disability).

REASONABLE ACCOMMODATION

"Reasonable Accommodation" means modifications or adjustments that place applicants or employees in a position to perform a job or enjoy benefits on the same basis a similarly situated individuals without disabilities. An employer "discriminates" under the ADA, inter alia, when it fails to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability." Other than the foregoing vague definition, the ADA provides no guidance as to how an employer should meet its reasonable accommodation obligation. However, the EEOC's regulations are instructive.

The EEOC's Technical Assistance Manual describes the four steps of the "interactive process" as: 1) identifying the essential functions of the specific job; 2) consulting with the employee to determine his or her specific physical or mental limitations; 3) in consultation with the employee, identifying potential accommodations and assessing how effective each would be in enabling the employee to perform the essential job functions; and 4) selecting the accommodation that best serves the needs of the employee and the employer. However, neither the ADA or EEOC state which party has the ultimate burden of establishing that a proposed accommodation is reasonable.

In *Beck v. University of Wisconsin Board of Regents*, 75 F.3d 1130 (7th Cir, 1996), the Seventh Circuit utilized the EEOC's interactive analysis approach to determine the parties' mutual obligations. Ms. Beck, a secretary in the School of Nursing, suffered from recurrent major depression, which she claimed was the direct result of her employment. After a leave, Beck was assigned to a less stressful position. When several attempts by the University to obtain medical information from Beck's doctor regarding her condition were of no avail and further accommodations of her condition such as decreasing her workload were considered insufficient, Beck sued the University for failing to reasonably accommodate her disability. The District Court granted summary judgment to the defendant, concluding that Beck had failed to provide the University with additional information about her medical condition when she refused to sign a medical release and otherwise delayed the interactive process.

In contrast, the Second Circuit in *Borkowski v. Central School District*, 63 F.3d 131 (2nd Cir, 1995), concluded that "the plaintiff bears the burden of showing that she is otherwise qualified; if an accommodation is needed, the plaintiff must show, as part of her burden of persuasion, that an effective accommodation exists that would render her otherwise qualified." Other circuits have used traditional discrimination case burdens of proof where (a) plaintiff must establish that (s)he is handicapped, but (b) with reasonable accommodation (which (s)he must describe), (s)he is able to perform the "essential functions" of the position.

ESSENTIAL FUNCTIONS

The employer may use several measures to determine whether a job function is essential: 1) the position exists to perform the function; 2) there are a limited number of employees among whom the performance of the job can be distributed and/or 3) the function is so highly specialized that the incumbent in the position is hired for his or her expertise to perform the particular function. In demonstrating that a function is essential, the employer may rely on: 1) the employer's judgment and 2) written job descriptions prepared before a position is advertised or applicants interviewed. The employer may use several measures to determine whether a job function is essential: 1) the position exists to perform the function; 2) there are a limited number of employee among whom the performance of that job can be distributed and/or 3) the function is so highly specialized that the incumbent in the position is hired for his or her expertise to perform the particular function. In demonstrating that a function is essential the employer may rely on: 1) the employer's judgment and 2) written job descriptions prepared before a position is advertised or applicants interviewed.

UNDUE HARDSHIP

The term "undue hardship" means an action requiring significant difficulty or expenses when considered in the light of certain specified factors, namely: "(i) the nature and cost of the accommodation needed under this Act; (ii) the overall financial resources of the facility or facilities involved in the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources of such accommodation upon the operation of the facility; (iii) the overall financial resources of the covered entity; the overall size of the business with respect to the number of its employees; the number, type and location of its facilities; the type of operation or operations of the covered entity..." 42 U.S.C. Section 12111 (10) (B).

MEDICAL EXAMINATIONS AND INQUIRIES

Pre-employment inquiries about an applicant's general health and medical history are prohibited. The employer may inquire into the ability of an applicant to perform job-related functions. The general rule is that an employer may not ask questions that are likely to elicit information about a disability. The employer can inquire about past attendance records but not reasons for use of sick leave.

EMPLOYER DEFENSES TO ADA DISCRIMINATION CLAIMS

1) Non-discriminatory disparate treatment. The individual was treated differently for legitimate non-discriminatory reasons.

2) Job related-Business Necessity. The job functions or standard the disable person cannot satisfy is job-related, consistent with business necessity and the required performance cannot be accomplished by reasonable accommodation.

DIRECT THREAT

The individual poses a direct threat to the health or safety or other individuals in the workplace. A direct threat entails "significant risk to the health and safety of others that cannot be eliminated by reasonable accommodation." In *Doe v. University Maryland Medical Systems Corp.*, 50 F.3d 1261 (4th Cir. 1995), a neurosurgical resident who may have contracted HIV through a needle stick was denied an ADA claim when he was suspended from surgical practice and offered an alternative residence

ENFORCEMENT

An aggrieved individual may file a charge with the EEOC. The process is discussed infra.

III. AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA)

The ADEA covers employers with twenty or more employees, employment agencies and labor organizations. Protected individuals includes those age forty and older. Exceptions include tenured employees at institutions of higher education who are 70 years of age.

Under the act it is unlawful for an employer to: 1) refuse to hire or to discharge any individual or otherwise discriminate against an individual with respect to his or her terms and conditions of employment because of such individual's age; 2) to limit, segregate or classify in any way which would deprive or tend to deprive any individual of employment opportunities because of the individual's age; 3) to reduce the wage rate of any employee to comply with the Act.

To establish a claim of age discrimination, the plaintiff may rely on direct evidence or by establishing a prima facie case showing:

> a) (s)he was in the protected group;
> b) (s)he performed her job in accordance with the employer's expectations;
> c) an adverse employment decision (e.g. discharge); and
> d) circumstances giving rise to an inference of age discrimination (e.g. (s)he was replaced by a younger employee). See *Fisher v. Vassar College*, 114 F.3d 1332, 1335 (2nd Cir. 1997)

The employer who articulates a legitimate nondiscriminatory reason for the action taken can rebut the plaintiff's prima facie case. If the employer's explanation is found to be a pretext by the jury, the ADEA claim will be sustained. The plaintiff also can establish an ADEA claim by showing that a policy which was ostensibly neutral on its face, had a disproportional or adverse impact on people who are members of a statutorily protected group. The U.S. Supreme Court

has declined to rule on whether the disparate impact theory is available in ADEA cases. *Hazen Paper Co. v. Biggins,* 507 U.S. 604, 113 S.Ct. 1701 (1993).

AFFIRMATIVE DEFENSES

The employer does not violate the ADEA if 1) age is a bona fide occupational qualification ("BFOQ") reasonably necessary to the normal operation of the employer's business (a mandatory retirement age for certain safety employees may be a BFOQ); 2) the challenged action is based on reasonable factors other than age; 3) the employer acted pursuant to a bonafide seniority system; 4) the discharge of the employee was for good cause; 5) the action involved an employee in a foreign country and compliance with ADEA would cause the employer to violate the laws of that country.

REDUCTIONS IN FORCE

Employees selected for termination during a RIF on the basis of objective criteria have been found not to violate ADEA. However, a company's failure to follow its own RIF procedures may be actionable. In *Hazen Paper, supra,* the Supreme Court ruled that an employer did not violate ADEA by discharging an employee to prevent his pension benefits from vesting although this action violated ERISA. In the Second Circuit, the court found violations where the employee's reassignment would render him overqualified for available positions but deemed legitimate a termination based on the employee's salary level as related to current market conditions.

The employer may make decisions based on valid economic criteria. The firing of a 55-year-old with back problems was upheld when the employer factored in the increased risk of the employee's filing worker's compensation claims.

WAIVER OF RIGHTS

The employee may execute a valid waiver of a claim under ADEA. The courts apply the totality of the circumstances test to determine if the individual's waiver is knowing and voluntary. The waiver agreement does not become effective for at least 7 days following its execution and the individual has 21 days to consider the agreement. There is a split in authority as to whether a waiver, which fails to comply with the criteria, is void or merely voidable. A clause in an employment contract requiring arbitration of ADEA claims may be enforceable. (See *Gilmer* for upholding such pre-employment agreements. See *Brisentine* for a contrary perspective (See Note No 1).

HANDLING REQUESTS FOR REASONABLE ACCOMMODATION AND LEAVE

As previously mentioned, the ADEA primarily imposes upon employers the obligation not to discriminate on the basis of age. Similarly, the ADA and the

Rehabilitation Act of 1973 impose upon employers the obligation not to discriminate on the basis of disability. The FMLA imposes upon employers the obligation not to discriminate on the basis of requesting or taking covered leave. In addition to the nondiscrimination obligation, however, the ADA, the Rehabilitation Act and the FMLA impose upon employers the duty to make certain accommodations. Under the ADA and the Rehabilitation Act, an employer must make accommodations, which allow a person with a disability to perform a job for which they are otherwise qualified. Under the FMLA, an employer must accommodate, for up to 12 weeks, a covered employee's need for leave because of a serious health condition of either the employee or a member of the employee's family.

Although each decision must be made on an individualized basis, it is imperative that a policy be established to handle requests for accommodation or leave. Included in the materials I have provided is a sample disability policy from the University of Arizona, which contains provisions regarding reasonable accommodation applicable to the ADA and the Rehabilitation Act (editor's note: due to limitations of space, materials such as these are not included herein. They are, however, identified and are available through the Internet or from the original source.). It provides a good overview of the issues that arise, and that should be addressed prior to handling any requests for reasonable accommodation. Note that this sample policy covers both employees and students of the university. Although this paper involves disability discrimination in the employment context, it should be remembered that federal prohibitions against disability discrimination, and the obligation for employers to make reasonable accommodations, apply to both employees and students in the higher education context. I have also included a sample policy from Rutgers (see previous note) detailing its procedures and policies relating to reasonable accommodation as applied to students.

Also included is a sample policy for FMLA leave. This policy explains the rights of employees under the FMLA, and addresses under what circumstances leave is mandated under the policy. An employer may also want to impose certain requirements on employees requesting leave, such as a requirement that they provide medical certification when they request leave. Policies addressing these issues must be disseminated among the employees.

HANDLING COMPLAINTS OF UNLAWFUL EMPLOYENT PRACTICES

I now wish to focus on the procedural issues that arise when an employee claims that these statutes, and analogous state provisions, have been violated. It is clear from the case law that has developed around these statutes that the employer that has acted to bring its employment practices into compliance is in a far better position to respond to discrimination charges than one that has not. Although a thorough effort to educate managers and employees about equal employment opportunity responsibilities and to review management decisions for potential conflict with the law reduces the risk of discrimination claims, it does not, unfortunately, eliminate them. Therefore, it is necessary to establish a coherent policy for dealing with claims of discrimination.

To successfully respond to a complaint or charge of discrimination, it is crucial for the responsible officials in the administration to put aside emotional reactions in order to move through the process and resolve the complaint. In many cases, efficient and thoughtful handling of discrimination claims at their outset can lay the groundwork for successful litigation, should that become necessary.

INTERNAL COMPLAINTS

In many cases, particularly with larger educational institutions, the college or university will have no notice of an employee's complaint of discrimination until a charge is filed with the EEOC. The steps the administration should take in those cases are discussed below. In some cases, however, an employee may first make an internal complaint, either formally or informally. Management and human resources professionals should view such internal complaints as an opportunity to resolve the issues head-on, possibly prevent the filing of a charge of discrimination.

Because an internal complaint procedure is so valuable in fostering EEO compliance, each employer's EEO policy should include a complaint procedure or incorporate one by reference. Thus, the first step when addressing internal complaints is to consult the equal employment opportunity policy. Included in the materials I gave you are three sample internal complaint or grievance policies. I'll discuss alternative dispute resolution (or ADR), including arbitration, in a moment, and such a grievance procedure can be the first step in an ADR program, or it can stand alone as an often effective way to deal with a discrimination complaint before state or federal agencies or the courts become involved. The first grievance procedure I have provided is for claims of disability discrimination, and it is from Northwestern University. The second sample disability grievance policy is from Stanford University. The third sample policy applies to other kinds of discrimination including age discrimination under the ADEA.

All supervisory employees should be familiar with the policy and therefore understand that it is their responsibility to report any complaints or allegations of discrimination up the chain of command. The complaining employee should be reminded of the policy, and assured that the employer will not tolerate any violation of the policy. The employee should also be assured that a thorough investigation will be conducted, and that appropriate corrective action will be taken. The employee should also be told to report immediately any subsequent acts of discrimination or retaliation, and instructed on how to report any such acts and to whom to report them. Note that all three of these polices refer to formal and informal complaint procedures. If the complaint of discrimination was made informally, the employee should be asked to provide specific information about the alleged discrimination, including the relevant dates, the names of witnesses to the alleged discrimination, and the names of other persons to whom the employee has spoken with regarding the alleged discrimination. The employer should then conduct its own investigation into the merits of the complaint. The accused employee should be informed of the investigation, reminded of the employer's

commitment to prevent and remedy discrimination as expressed in the EEO policy, and informed of the consequences for violation of the policy.

ALTERNATIVE DISPUTE RESOLUTION

Although it can be an effective way to resolve complaints of discrimination, an internal grievance procedure is not always effective. Alternative dispute resolution (ADR) has become an increasingly popular means of resolving work-related disputes. General federal and state guidelines for ADR may be used to arbitrate, rather than litigate, claims under the federal civil rights laws pertaining to employment. Components of ADR include having an open-door policy, grievance procedures, mediation, arbitration, and minitrials.

ADR has many benefits, including reduction of complaints filed with agencies or courts, rapid dispute resolutions, decreased costs (compared with litigation), confidentiality, and potential for improved employer-employee relations. The United States Supreme Court has held that if an employee has signed an arbitration agreement, the employee may be compelled to arbitrate instead of bringing a lawsuit.[1] Thus, by requiring employees to sign arbitration agreements, an employer can limit its exposure to costly and time-consuming litigation.

The Federal Arbitration Act[2] and statutes in most states set standards for determining the enforceability of arbitration proceedings and the means by which arbitration awards may be enforced or vacated. State statutory law makes an important distinction between arbitration, which is frequently binding, and mediation, which is frequently nonbinding. Either of these options, however, is almost certainly less expensive than a trial in state or federal court. As the number of claims based on employment disputes continues to rise and the overall costs of litigation increase, employers may be more likely to obtain arbitration or mediation agreements from their prospective employees.

Requiring employees to sign individual agreements calling for arbitration of employment claims may create a binding arbitration agreement.[3] In addition, an agreement to arbitrate may be created by specific provisions in an employee handbook.[4] Obviously, for union employees the obligation to submit disputes to arbitration may also be contained in the collective bargaining agreement (CBA), but CBA's are ordinarily silent with regard to statutory discrimination claims brought by employees against the employer.

Some of the most important considerations to be taken into account in developing an ADR policy include the following:

- What types of ADR will be utilized
- Which employees may be subject to ADR
- Which disputes will be resolved through ADR
- Which costs will be borne by the parties

- Whether the sides will have legal or other representation
- What rules of procedure will be followed
- What remedies will be available
- What recourse will be available for parties unsatisfied with the results of ADR

Although an agreement requiring employees to arbitrate discrimination claims can be a valuable tool in some circumstances, it is not a miracle cure for exposure to potential liability under the ADA or the ADEA. Such an agreement may bar a judicial remedy, in other words, it may prevent an employee from suing the institution on his or her own. The Equal Employment Opportunity Commission (the EEOC), however, has taken the position that an employee's right to file a charge, and the EEOC's right to investigate, are non-waivable.[5] Therefore, even with mandatory arbitration, the college or university may still face an administrative complaint before the EEOC. Furthermore, because an arbitration requirement deals only with the remedy of the individual employee or employees, the EEOC may take the position that such an agreement does not foreclose a judicial enforcement action by the EEOC.

Arbitration of discrimination claims in the higher education context has been an issue with which the courts have struggled. Some recent decisions in this area point out that there are both benefits and pitfalls to arbitration requirements. A New York appellate court has held that a public university may validly require, as part of a collective bargaining agreement, that an employee exhaust grievance or arbitration procedures prior to litigating a claimed violation of the New York Civil Service Law in court. Where an employee signing such a collective bargaining agreement fails to exhaust those procedures, she is barred from seeking redress in court because she did not exhaust her administrative remedies. However, the court held that such a requirement would not bar a suit alleging a violation of Exec. Law § 296, which covers discrimination claims.[6] New Jersey's Law Against Discrimination provides that an aggrieved party may file suit in the Superior Court or seek administrative relief from the Division on Civil Rights.[7] A court has held that when an employee of a university chose to pursue her grievance administratively, rather than seeking court relief in the first instance, the chosen remedy became exclusive while it was pending and when the plaintiff voluntarily abandoned her appeal from a finding of no probable cause, she could not then seek alternative relief by way of a court trial based upon the same grievance.[8]

In a recent case the federal First Circuit Court of Appeals held that the Federal Arbitration Act did not require a university professor to arbitrate his discrimination claims against the university, which allegedly denied him tenure because he was HIV-positive, because, under the parties' arbitration agreement, the arbitrator's authority was limited to procedural issues. The arbitrator could neither grant nor deny tenure, and arbitration was not designated as the exclusive means of dispute resolution.[9]

Restrictions on the availability of grievance procedures to those not pursuing other remedies may also pose a problem. In one case, the court held that although a university is certainly free not to provide grievance proceedings for employees, a collective bargaining agreement violates the ADEA where it stipulates that grievance proceedings are available only if the employee has not filed an ADEA claim in an administrative or judicial forum.[10]

ADMINISTRATIVE PROCEDURES UNDER THE ADA, THE ADEA, AND THE FMLA

As previously discussed, the EEOC takes the position that its administrative jurisdiction is unaffected by waivers or arbitration agreements. Even with a grievance procedure or arbitration clause, a college or university may find itself facing an administrative charge of discrimination. The administrative procedures for the ADEA and ADA are essentially the same. Plaintiffs alleging violations of the ADEA and ADA must first file a charge with the Equal Employment Opportunity Commission ("EEOC") within 180 days after the alleged unlawful practice occurred. In states like New York and New Jersey, which have their own anti-discrimination statutes and staff agencies to handle such claims, that time period is extended to 300 days. The EEOC, and in some cases also the state agency, will then have an opportunity to investigate the charge. In many cases, the EEOC does not take advantage of this opportunity and will terminate the investigation by sending the employee a Notice of Right to Sue. The employee may also request this notice, and the EEOC regularly complies with such requests. After receiving the Notice of Right to Sue, the employee may bring a court action anytime prior to 90 days after the Notice.[11]

In one case, a court held that where a university professor lodged a complaint with the EEOC and then subsequently withdrew that complaint, he could not pursue his claim in federal district court where he filed his court action more than 90 days after withdrawing the EEOC complaint.[12]

An ADEA plaintiff is required to participate in good faith in the administrative process until a lawsuit is brought.[13] This imposes upon plaintiffs a duty to cooperate with EEOC officials seeking to affect a pretrial settlement.[14] It has been held that a plaintiff's refusal of an offer of full relief tendered by a university employer during the pretrial conciliation period does not bar an ADEA plaintiff's claim in federal district court. The court further ruled, however, that the university's obligation to pay damages might be decreased in such a situation because a claimant is obligated to minimize damages. The United States Supreme Court has held that a plaintiff forfeits his or her right to an award of backpay where, during the conciliation period, he or she refuses a job "substantially equivalent to the one that was denied."[15] However, where the offer tendered by the employer contains a requirement that the employee drop any pending cases alleging discrimination, courts will not find that the offer constituted "full relief."[16]

The United States Supreme Court has held that the statute of limitations in which a plaintiff must file a complaint with the EEOC is not tolled during the time

in which the employee seeks redress through internal university grievance procedures.[17] Unlike the ADA and ADEA, the FMLA does not require exhaustion of administrative remedies prior to filing suit.[18] Although a complaint may be lodged with the Secretary of Labor, and the Department of Labor may sue on the employee's behalf, an aggrieved employee may proceed directly to court, bypassing any administrative procedure. The statute of limitations for a claim under the FMLA is two years.

ADMINISTRATIVE PROCEDURES UNDER NEW JERSEY AND NEW YORK LAW PROHIBITING AGE AND DISABILITY DISCRIMINATION

Under the New Jersey Law Against Discrimination,[19] parties who have suffered discrimination may file a verified complaint with the New Jersey Division on Civil Rights.[20] At any time after 180 days from the filing of the administrative complaint, the complaining party may file a request with the Division to present the action to the Office of Administrative Law for a hearing.[21] However, if the Division finds that no probable cause exists for the allegations, no action may be pursued in the Office of Administrative Law.

After the filing of a complaint, an investigation is undertaken by the Attorney General's office, whereby it is determined whether probable cause exists.[22] If such a finding is made, the office undertakes conciliation with the respondent to eliminate the unlawful employment practice. The attorney general's office is empowered under the law to compel compliance with the law by summary proceedings in Superior Court at any time after the filing of a complaint.[23] Aggrieved parties themselves also have the right under the statute to file a suit in Superior Court without first filing an administrative complaint. The plaintiff may obtain a jury trial upon request. Prosecution of a suit in court bars the filing of any administrative action during pendency of the suit.

Under New York's Human Rights Law,[24] a party who has suffered discrimination may file a verified complaint with the New York Division of Human Rights within one year of the alleged discriminatory practice.[25] The Division may also file such a complaint on its own motion. The Division must promptly investigate such a complaint, and must determine within 180 days whether it has jurisdiction over the complaint and whether probable cause exists as to the party's allegations. If the Division answers either of those determinations in the negative, it must dismiss the complaint. The Division has the power after a complaint is filed to seek a court order to prevent an unlawful practice under the law. At any time after the complaint is filed, the Division may undertake conciliation with the respondent in an effort to eliminate the unlawful practice.[26] An agreement reached in this fashion may be entered in the appropriate court where the alleged discrimination occurred.

Within 270 days after a complaint is filed, or within 120 days after a court has reversed and remanded an order of the Division dismissing a complaint, the Division must notify the respondents and hold a public hearing before a hearing examiner at a time not less than 5 and not more than 15 days after service. The

respondent must file a sworn written answer to the complaint at least 2 days prior to the hearing and serve copies upon other parties to the proceeding.[27] Within 180 days after commencement of the hearing, a determination must be made. If a commissioner finds that the respondent has committed an unlawful practice, he or she may order the respondent to cease and desist, may require affirmative action, and may award compensatory damages. No later than one year after the date of a conciliation agreement or issuance of an order under the law, the Division must investigate whether the respondent is complying with the terms of the agreement or order. If there is noncompliance, the Division must take appropriate action.[28] Any person aggrieved by conduct prohibited by the law has a cause of action in any court of appropriate jurisdiction unless such person has filed a complaint with any local commission on human rights.[29] At any time prior to a hearing before a hearing examiner, the aggrieved party may ask the Division to dismiss the complaint so that he or she may pursue the claim in state court.[30] Judicial review of any order or dismissal of the Division is available.[31]

INTERPLAY BETWEEN THE ADA, FMLA AND STATE WORKER'S COMPENSATION LAWS

A troubling conflict for employers arises in connection with the interplay between the ADA and state workers' compensation statutes. It is possible, for example, for a person to be considered "permanently and totally disabled" for purposes of a state workers' compensation statute, while coming within the definition of a "qualified individual with a disability" under the Americans with Disabilities Act.

Under the typical workers' compensation law, an employer is not required to consider whether a worker can perform a job's "essential functions" or to provide a reasonable accommodation. An injured worker may therefore be legally entitled to receive workers' compensation benefits and may also be able to demand that he be employed through reasonable accommodation of his disability.

Under disability discrimination laws, however, an injured worker will be protected if he or she has a physical or mental impairment that substantially limits major life activities such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, or working in a job requiring heavy labor. As I previously mentioned, an employer's obligation of reasonable accommodation may include job restructuring, part-time or modified work schedules, provision or modification of equipment, and if necessary, reassignment to a vacant position. Thus, an employer who tells an injured worker that he may not return to work until he is 100% may be in violation of the ADA. In such a situation, it is therefore in the employer's best interest to attempt accommodation if possible, and the EEOC has taken the position that failure to make reasonable accommodation in this situation may violate the ADA.[32]

Two examples given by the EEOC illustrate the potential conflict:

Example 1: Suppose an employer has a "sack-handler" position which requires that the employee pick up 50-pound sacks from a loading dock and carry them to the storage room. The employee who holds this position is disabled by a work-related back impairment and requests an accommodation. The employer analyzes the job and finds that the essential function of the position is to move the sacks from the loading dock to the storeroom, not necessarily to lift and carry the sacks. After consulting with the employee to determine his exact physical abilities and limitations, it is determined, with medical documentation, that the employee can lift 50-pound sacks to waist level, but cannot carry them to the storage room. A number of potential accommodations may be instituted, including the use of a dolly, a handtruck, or a cart.

Example 2: Suppose a construction worker falls from a ladder and breaks a leg and the leg heals normally within a few months. Although this worker may be awarded workers' compensation benefits for the injury, he would not be considered a person with a disability under the ADA, as the impairment did not "substantially limit" a major life activity, since the injury healed within a short period and had little or no long-term impact. However, if the worker's leg took significantly longer to heal then usual for the type of injury, and during this period the worker could not walk, he would be considered to have a disability under the ADA. Or, if the injury causes a permanent limp, the worker might be considered disabled under the ADA if the limp substantially limited his walking as compared to the average person in the general population. If so, the employer could not refuse to make reasonable accommodations.

In one case in which this conflict was presented, the Tenth Circuit Court of Appeals held that an employee was not the victim of discrimination despite not being allowed to return to work after a work-related injury. He had permanent partial disabilities to his feet, and there were inconsistent medical opinions. One opinion was that he could not return to work at all; the other opinion was that he could return only to work with restrictions on standing. The court held that the employee could not be considered to be handicapped or disabled because he failed to demonstrate a significant restriction in his ability to perform a class of jobs, rather than just the particular job in question.[33]

In another case, the court held that an employer violated the Rehabilitation Act by summarily discharging an employee who sustained a back injury at work which restricted her ability to walk, sit, stand, drive, care for her home, and engage in recreational activities.[34] The employee was, in the court's view, a person with a disability and was qualified to perform her job as a receptionist-clerk with reasonable accommodation. The employer's failure to allow the employee to continue working with accommodations, such as providing her with a wooden straight back chair, allowing her to use the elevator, and allowing for regular breaks, violated the Act.

Workers' compensation leave may run concurrently with FMLA leave. State workers' compensation schemes may permit the employer to offer an injured worker a light duty assignment. However, the FMLA bars employers from requiring that the employee accept an alternative work assignment. By declining a light duty assignment and exercising the remainder of his or her FMLA leave, the employee may terminate their state workers' compensation benefits. The FMLA employee accepting the light duty assignment will retain the right to return to an equivalent position held before the commencement of the 12 week leave.

States have split on how they treat the interplay between their state worker's compensation statutes and their state disability discrimination statutes. For example, some courts have held that the remedy for disability discrimination related to injuries which occurred on the job is exclusive to the worker's compensation statute.[35] Other courts have taken the opposite approach, allowing remedies under both the worker's compensation statute and the statute prohibiting disability discrimination.[36]

There is also substantial overlap, and some potential conflicts, between the ADA, the FMLA and state worker's compensation laws. An FMLA "serious health condition" is not necessarily an ADA "disability." The ADA sets no limits on the amount of leave an employee can take to receive medical treatment while the FMLA allows no more than 12 weeks in a 12-month period. An ADA "disability" is an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment.

Some FMLA "serious health conditions" may be ADA disabilities, for example, most cancers and serious strokes. Other "serious health conditions" may not be ADA disabilities, for example, pregnancy or a routine broken leg or hernia. This is because the condition is not an impairment (e.g., pregnancy), or because the impairment is not substantially limiting (e.g., a routine broken leg or hernia). In addition, the fact that an individual has a record of a "serious health condition" does not necessarily mean that s/he has a record of an ADA disability. Under the ADA, an individual must have a record of a substantially limiting impairment in order to be covered. Other areas in which the statutes overlap include:

1) the ADA severely restricts the ability of employers to make inquiries whereas FMLA authorized such inquiries when related to the certification of a serious health condition.

2) an employee terminated for failure to return after expiration of FMLA might still be eligible for ADA or state workers' compensation statute, including additional leaves.

3) an employee taking intermittent leave under ADA as a reasonable accommodation could continue on an intermittent or reduced schedule under the FMLA. The employer would have to provide the FMLA leave

even though it posed a hardship since there is no "undue hardship" under FMLA.

4) Under the ADA the disabled employee is encouraged to work even if light duty, however ADA does not protect an employee's absenteeism. The FMLA prohibits employers from considering absenteeism where there is a FMLA qualifying reason.

5) The employer may satisfy its FMLA obligation by offering the Employee reinstatement to an equivalent position, however, if the employee declines under the ADA the employer may be required to place the employee in a part-time job with the requisite pay and benefits.[37]

Finally, just because someone has a "serious health condition" also does not mean that the employer regards him/her as having an ADA disability. To satisfy this prong of the ADA definition of "disability," the employer must treat the individual as having an impairment that substantially limits one or more major life activities. To determine if an individual has an ADA disability, all pertinent evidence, including any information about whether the individual has or had a "serious health condition," should be considered. Under the FMLA regulations, employers must allow EEOC investigators to review pertinent FMLA medical certifications and recertifications, and other relevant materials, upon request.

One potential problem concerns the situation in which both the ADA and the FMLA apply, and how an employer should determine which terms and conditions govern the employee's initial 12 weeks of medical leave. On this point, the EEOC has stated that under the FMLA rule, an employer must provide leave under whichever statutory provision provides the greater rights to employees.

An issue arises regarding workers' compensation leave and the FMLA requirement that, to be eligible for FMLA leave, and employee must have worked 1,250 hours. For the FMLA, "hours" means actual hours worked, but state law on this point may vary. For purposes of the New Jersey law, a court has held that regular hours for which an employee is paid workers' compensation benefits due to temporary disability must be counted as "base hours" toward the 1000 hour NJ requirement for determining whether a person is an "employee" under the Family Leave Act.[38]

Another interesting question arises regarding the effect of state workers' compensation "exclusive remedy" provisions and the FMLA. Most states provide that the remedies available under the workers' compensation statute are the only remedies available to an employee who suffers a workplace injury. A Wisconsin court has held that a former employee who settled her worker's compensation claim was estopped from arguing that her injury was not work-related, and she therefore lost her FMLA claim under the exclusive remedy provision of the Worker's Compensation Act.[39]

Finally, a related matter in discrimination law entails the interrelationship of the ADA to Social Security Supplemental Security Income (SSI). The issue commonly arose in the form of a judicial estoppal defense wherein the employer argued that the employee should not be allowed to sue under the ADA because (s)he was a recipient of SSI. [See *Marcello v. Chemical Bank*. 923 F.Supp. 487 (S.D. N.Y. 1996] Resolving the conflict among federal courts as to whether the successful application for disability insurance precluded a claim under ADA, the U.S. Supreme Court has recently and unanimously held in *Cleveland v. Policy Management Systems Corporation*, No. 97-1008 that while the two laws appear "divergent" in context they "do not inherently conflict" and "can comfortably exist side by side."

Attachments—Editor's Note

The author refers to a number of attachments for the edification of the readers. Due to their length and ready accessibility on the Internet, they are not reproduced here. They include:

- Disability Policy, The University of Arizona, including the Americans With Disabilities Act of 1990; Section 504 of the Rehabilitation Act of 1973.
- Sample Disability/Reasonable Accommodation Policy, Rutgers University.
- Sample Disability Grievance Procedure, Stanford University.

ENDNOTES

[1] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).
[2] 9 U.S.C. § 1 et seq.
[3] Mugnano-Bornstein v. Crowell, 42 Mass. App. Ct. 347, 677 N.E.2d 242, 1997 WL 126075 (Mass. App. 1997) (holding that former employee waived statutory right to jury trial of sexual harassment and gender discrimination claims, where she agreed in employment agreement to arbitrate "any controversy arising out of or in connection with [her] employment or termination of employment").
[4] Nghien v. NEC Elecs, Inc., 25 F.3d 1437 (9th Cir. 1994), cert. denied, 115 S.Ct. 638 (1994).
[5] EEOC Notice No 915.002, Enforcement Guidance on Non-waivable Employee Rights Under EEOC Enforced Statutes (Apr. 10, 1997).
[6] See Rissinger v. State University of New York at New Paltz, 605 N.Y.S.2d 437 (N.Y.A.D. 3 Dept. 1993). 0:5-13 (1998).
[7] See N.J.S.A. 10:5-13 (1998).
[8] See Hermann v. Farleigh Dickinson Univ., 444 A.2d 614, 616 (N.J. App. Div. 1982).
[9] See Brennan v. King, 139 F.3d 258, 264 (1st Cir. 1998).
[10] See EEOC v. Board of Governors of State Colleges, 957 F.2d 424 (7th Cir. 1992); 29 U.S.C. § 623(d).
[11] See Hodge v. New York College of Podiatric Medicine, 940 F.Supp. 579, 582 (S.D.N.Y. 1996); 29 U.S.C. § 626(d).
[12] See Hodge v. New York College of Podiatric Medicine, 940 F.Supp. 579, 582 (S.D.N.Y. 1996); 29 U.S.C. § 626(d).
[13] See Hodge, supra, 940 F.Supp. at 582.

[14] See Gerardi v. Hofstra, 897 F.Supp. 50, 57 (E.D.N.Y. 1995).
[15] See e.g. Munoz v. Aldridge, 894 F.2d 1489, 1492 (5th Cir. 1990) (dealing with Title VII).
[16] Ford Motor Co. v. EEOC, 458 U.S. 219, 231-32, 102 S.Ct. 3057, 3065-66, 73 L.Ed.2d 721 (1982).
[17] See Gerardi, supra, 897 F.Supp. at 57-58 n.6.
[18] See Delaware State College v. Ricks, 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980).
[19] 29 U.S.C. § 2617(b).
[20] N.J. Stat. Ann., §§ 10:5-1 et seq. (West 1993).
[21] Id. § 10:5-13.
See Aldrich v. Manpower Temporary Services, 277 N.J.Super. 500, 650 A.2d 4 (1994).
[22] Id. § 10:5-14.
[23] Id. § 10:5-14.1.
[24] N.Y. Exec. Law §§ 290-301 (McKinney 1993).
[25] Id. § 297.
[26] Id.
[27] Id.
[28] Id.
[29] Id. § 297.
[30] Id.
[31] Id. § 298.
[32] EEOC Technical Assistance Manual § 3.8, 9.2 (1992).
[33] Bolton v.Scrivner, Inc., 36 F.3d 939 (10th Cir 1994).
[34] Perez v. Philadelphia Housing Auth., 677 F. Supp. 357 (E.D. Pa. 1987), affd., 841 F. 2d 1120 (3d Cir. 1988).
[35] Usher v. American Airlines, 20 Cal. App. 4th 1520, 25 Cal. Rptr. 2d 335 (1993); Karst v. FC Hayer Co., 447 N.W.2d 180 (1989).
[36] Cox v. Glazer Steel Corp, 606 So. 2d 518 (1992) (stating that the Civil Rights Act for Handicapped Persons provides a distinct statutory remedy for the handicapped not within the scope of the workers' compensation law, and its application is not barred by that law); King v. Bangor Fed. Credit Union, 568 A.2d 507 (Me. 1989).
[37] Barry C. Brown, "Attendance Control Problems," National Academy of Arbitrators, Continuing Education Conference, (November, 1998); Ruth D. Raisfeld,"Guide To Compliance with the Family & Medical Leave Act," Orrick, Herrington & Sutcliffe (1998).
[38] Kenny v. Meadowview Nursing and Convalescent Center, 308 N.J. Super. 565, 706 A.2d 295 (N.J.Super.A.D. 1998).
[39] Finnell v. Dept. of Industry, Labor & Human Relations, 188 Wis.2d 187, 519 N.W.2d 731 (Wis.App. 1994).

HUMAN RESOURCES ISSUES

C. PENSION AND BENEFIT ISSUES UPDATE PRESENTATION

Keith Rauschenbach, Second Vice President
TIAA-CREF

Over the past few years, we have seen an overabundance of federal pension legislation and proposed and final IRS regulations. In the next 20 minutes, I will highlight some of these new regulations and legislation and let you know what new legislation has been introduced in Congress.

You've already heard from Donna Zucchi and Kurt Ritter about how the Small Business Job Protection Act of 1996 and the Taxpayer Relief Act of 1997 have:

- increased the amount that individuals (especially the non-highly compensated) can save for retirement;
- created new savings vehicles for retirement, and
- introduced new ways to save for a college education.
- Congress and the IRS have also tried to simplify the ways retirement and tax-deferred annuity plans are administered:
- There are new 401(m)/401(k) design-based safe harbors -- if an institution adopts these safe harbors they won't have to perform the 401(m)-matching test each year.
- The minimum participation rules were repealed, which means that an institution's retirement plan doesn't have to cover a minimum number or percentage of employees each year.
- The definition of highly compensated employee was simplified so that now only two categories of highly compensated employee exist.

- The plan cash out amount was increased to $5,000.

- SPDs no longer have to be filed with the DOL.

- The five-year income averaging rules will be repealed beginning in the Year 2000. and

- The family aggregation rules were repealed to simplify non-discrimination testing.

However, even though Congress — and the IRS — have attempted to simplify how retirement and tax-deferred annuity plans are administered, they have in fact, actually increased the types of service employers expect from their carriers.

Take 402(g) monitoring as an example. Since 1997 (as part of the Small Business Job Protection Act), tax-deferred annuity providers have had to make sure that employee elective deferrals do not exceed the Section 402(g) limit — currently $10,000, or $13,000 for employees with at least 15 years of service at a qualified educational organization, hospital, home health service agency, health and welfare service agency or church. As a result, tax-deferred annuity providers, like TIAA-CREF, now conduct year-end reviews of employee elective deferrals on an institution-by-institution basis.

Institutions are now in the habit of hearing from us by the middle of January if any employees at their institution have made excess elective deferrals during the preceding year. They are also expecting that TIAA-CREF will refund the excess contributions to their employees in a timely manner — by April 15th. And that employees will also receive the appropriate tax reports for both the current year and the following year.

A natural byproduct of 402(g) monitoring is an increase in the number of TDA calculations that an institution or a participant requests. Because a 402(g) violation could potentially disqualify the employee's contract — making all contributions and earnings immediately taxable — more and more institutions are making sure before the year begins that their employees contribute only the amount that is permitted based on the calculation they receive. This way, there is very little, if any, chance that an employee will over-defer during the year.

Another byproduct, although less obvious, is that more institutions are seeking help with nondiscrimination testing. As more employees are encouraged to contribute more to their retirement and TDA plans, institutions need to be careful about how much is actually contributed by their highly compensated employees compared to what is contributed by or on behalf of their non-highly-compensated employees.

And when you add that institutions also expect help with their Form 5500 filings each year, institutions have come to expect (usually for free) quite an array of services from their carriers.

Since 1994, institutions have also had to deal with the increasing interest by the IRS to audit 403(b) plans. The IRS looks for a number of violations when auditing a 403(b) plan: excess contributions by both the institution and the employees; invalid salary reduction agreements; nondiscrimination rules violations; inadequate Form 5500 filings; and invalid distributions, loans, withdrawals and transfers. Not only have the number of IRS 403(b) plan audits increased, but also for some reason lately the IRS has focused its attention in the Northeast and the Midwest. As a result, institutions are turning to their carriers for help when they are audited. And a number of institutions have decided to perform self-audits before the IRS comes calling. This puts an even heavier burden on carriers to provide institutions with the types of information that the IRS looks for during a 403(b)-plan audit.

In an effort to simplify the audit process, the IRS recently issued a revenue procedure for correcting 403(b) compliance problems. Revenue Procedure 99-13, issued by the IRS in January, authorizes new, simpler procedures for correcting excess contributions and/or elective deferrals to 403(b) plans if certain requirements are met.

The new Revenue Procedure also makes it easier for administrators of 403(b) retirement plans to self-correct many other types of compliance problems without notifying the IRS or paying any fees or penalties. Even 403(b) plans that have already been notified of an impending audit are allowed to use these procedures to negotiate a correction method with the IRS with the assurance that any sanctions will bear a "reasonable relationship to the nature, extent, and severity" of the violation.

CORRECTING EXCESS CONTRIBUTIONS AND DEFERRALS

As we all know, a participant in a 403(b) plan has an excess contribution or deferral when his or her contributions exceed the limits contained in Sections 403(b), 415, or 402(g) of the Internal Revenue Code. Failure to eliminate any excess in a timely fashion will expose the participant and/or plan sponsor to potential serious tax consequences. In the past, correction methods differed depending upon which limit was exceeded and some types of excess contributions were subject to double taxation. In most cases, however, the new Revenue Procedure will allow sponsors of 403(b) plans to eliminate any excess contributions or deferrals by having the excess refunded to the participant.

403(b) limit. The 403(b) limit (also known as the Maximum Exclusion Allowance or MEA) applies to both employee elective deferrals and employer 403(b) contributions. Under this limit an employee's annual contributions are

generally limited to 20% of his or her includible compensation for the year multiplied by years of service minus the total of employer contributions in prior years.

The IRS had previously indicated that if an employee's contributions exceeded the MEA, then the excess would have to remain in his or her contract until a triggering event (e.g., death, disability, or attainment of age 59-1/2) occurs although the excess amount is taxable to the employee in the year contributed.

Under Revenue Procedure 99-13, however, contributions in excess of the 403(b) limit can be refunded to the employee provided that the excess inadvertently occurred in spite of procedures that the plan sponsor (or carrier) had put in place to prevent such excess contributions. If a plan sponsor notifies TIAA-CREF that an employee exceeded his or her 403(b) limit in spite of procedures that the institution had put it place to prevent excess contributions and deferrals, TIAA-CREF will refund the excess and attributable earnings to the participant and issue them a 1099-R for the year of the refund.

415 limit

Section 415 of the Internal Revenue Code generally limits a participant's annual contributions to a 403(b) plan to the lesser of $30,000 or 25% of his or her compensation.

Prior to Revenue Procedure 99-13, contributions in excess of the 415 limit generally could not be refunded to an employee unless the excess occurred as a result of an allocation of forfeitures or a reasonable error in estimating the employee's compensation or the amount of permissible deferrals prior to the end of the year. Otherwise, the excess had to remain in the 403(b) contract and the employer was required to issue a corrected W-2 for the year of deferral.

Under Revenue Procedure 99-13, refunds are allowed as long as the excess occurred inadvertently in spite of procedures that the plan sponsor (or carrier) had put in place to prevent such excess contributions. If a plan sponsor notifies TIAA-CREF that an employee exceeded his or her 415 limit in spite of procedures that the institution had put it place to prevent excess contributions and deferrals, TIAA-CREF will refund the excess and attributable earnings to the participant and issue them a 1099-R for the year of the refund.

402(g) limit

The 402(g) limit generally limits a participant's elective deferrals (i.e., voluntary pretax contributions) to a 403(b) plan to $10,000 in 1999. Certain long-service employees are eligible for higher limits.

Prior to Revenue Procedure 99-13, contributions in excess of the 402(g) limit generally could be refunded to an employee as long as the distribution was made by April 15 of the following year. If contributions in excess of the 402(g) limit were not refunded by April 15 of the following year, they generally couldn't be refunded until the employee incurred a hardship, terminated employment, or attained age 59-1/2, and were taxed to the participant both in the year of the contribution and in the year distributed.

Under Revenue Procedure 99-13, a plan sponsor may be able to correct excess deferrals after the April 15 deadline if the plan sponsor (or carrier) had procedures in place to prevent such excess contributions, but the excess occurred any way. These excess contributions, however, are taxed twice unless they are distributed by the April 15 deadline.

In May, TIAA-CREF will be publishing a Benefit Plan Counselor Special Report detailing how we help institutions during an IRS 403(b) plan audit or a self-audit. The report will also cover in detail the new correction procedures that Revenue Procedure 99-13 has made available for bringing 403(b) retirement plans into compliance with legal requirements.

Now I would like to spend a few minutes highlighting some of the other new IRS rulings that have been issued since the beginning of the year. And then I will talk for a few minutes more about Senator Roth's newest legislation that was introduced at the end of February.

1999 MINIMUM DISTRIBUTION DEADLINE

The Small Business Job Protection Act of 1996 eliminated the requirement that employees of private institutions start taking minimum distributions no later than April 1 following the year in which they attain age 70-½, even if they haven't separated from service yet. But even though in-service distributions are no longer required for employees at age 70½, all private institutions must continue to make these in-service distributions available to at least some employees when they attain age 70½ and private institutions that don't adopt appropriate plan amendments by the end of 1999 will generally have to continue making in-service distributions to all employees at age 70½:

- private employers who adopted appropriate plan amendments in 1998 can eliminate in-service distributions for employees attaining age 70½ after December 31, 1998;

- private employers who adopt appropriate plan amendments in 1999 can eliminate in-service distributions for employees attaining age 70½ after December 31, 1999; but

- private employers who do not adopt appropriate plan amendments by the end of 1999 cannot eliminate in-service distributions for any employees after they attain age 70½.

What's on the Horizon? Although there are a number of pension legislation proposals introduced in Congress all of the time, I want to focus for a few minutes on the Retirement Savings Opportunity Act of 1999, introduced in February, by Senator William V. Roth, Jr. of Delaware.

In order to address the issue of baby boomers and others not having enough savings for their financial needs during retirement, Senator Roth introduced the Retirement Savings Opportunity Act to give these working Americans the opportunity to save more for retirement. Now I will highlight some of the provisions of this bill.

Increased IRA Dollar Limit

The maximum contribution limit for IRAs (both traditional IRAs and Roth IRAs) is $2,000, which has never been indexed for inflation. If the IRA limit were indexed for inflation it would be $4,930. The limit for all IRAs will be increased (under the proposed legislation) to $5,000 per year. In addition, this limit would be adjusted annually for cost of living increases, in $100 increments.

Increased IRA Income Caps

There are different caps on contributions to traditional and Roth IRAs. They are as follows:

Tax Deductible Contributions to Traditional IRAs

Under current law, if an individual is an active participant in an employer-provided pension plan, the amount of a deductible contribution that can be made is reduced if the adjusted gross income of the taxpayer is over $51,000, if filing a joint return, or $31,000 for all other filers. These income limits are scheduled to increase annually until the year 2007 when the joint filer limit will be $80,000 and the single filer limit will be $40,000. Married filing separately taxpayers are precluded from making deductible contributions if their adjusted gross income is above $10,000. In addition, if an individual is not an active participant and the individual's spouse is, the income limit is $150,000. The bill will eliminate these income limits for deductible IRAs.

Contributions to Roth IRAs

In order to convert to a Roth IRA, an individual's adjusted gross income must not exceed $100,000, regardless of whether the individual is married filing

jointly or single. Married individuals who are filing separately cannot convert to a Roth IRA. The bill will raise the income cap for conversions to $1 million.

Increase Other Dollar-Based Benefit Limitations

Currently, the maximum pretax contribution to a 401(k) or a 403(b) plan is $10,000. In addition, the maximum contribution to a 457(b) plan (a salary deferral plan for employees of government and tax-exempt organizations) is $8,000. Finally, the maximum contribution to a SIMPLE plan (a simplified defined contribution plan available only to small employers) is $6,000. These limits are indexed for cost of living increases. There has traditionally been a differential in contribution limits among the various types of plans: IRAs (which are individual plans) having the lowest limits; and 401(k) and 403(b) plans having the highest limits but the greatest number of regulations. The bill will increase limits for 401(k) and 403(b) plans to $15,000 and the IRA limit will be raised to $5,000. The limit for 457(b) plans for government employees would increase to $12,000.

Roth 401(k) or 403(b) Plan

The bill provides that companies can give participants in 401(k) plans and 403(b) plans the opportunity to contribute to these plans on an after-tax basis, with earnings on such contributions being tax-free when distributed, like under the Roth IRA. More than the maximum Roth IRA contribution amount can be contributed under this option; employees would be limited to the maximum 401(k) or 403(b) contribution amount. The regular distribution rules (rather than the Roth IRA distribution rules) for these types of plans would apply.

Catch-Up Contributions

This provision will provide an additional savings opportunity to those individuals who are close to retirement. The bill will give those who are age 50 the opportunity to contribute an additional amount in excess of the annual limits equal to an additional 50% of the annual limit. Catch-up contributions will be allowed in 401(k) plans, 403(b) plans, 457(b) plans and IRAs. For IRAs, this will mean that someone age 50 could contribute $7,500 each year rather than $5,000. These additional catch-up contributions will not be subject to the normal non-discrimination rules for other contributions.

Elimination of 25% of Compensation Limitation

Currently, the maximum amount that can be contributed to a defined contribution plan on behalf of an individual participant is the lesser of $30,000 or 25% of compensation. This includes both employee contribution and any matching contributions or profit-sharing contributions made by the plan sponsor. This bill will eliminate the 25% of compensation limit, so that the maximum contribution that is made on the behalf of any individual is $30,000.

IRA Contributions to an Employer Plan

The bill gives employers the opportunity to accept traditional IRA contributions as part of their regular employer plan. In addition, it gives employees the ability to have IRA contributions made directly to the employer-sponsored IRA as a payroll deduction. The advantage of using an employer plan as an IRA account is that the administrative costs in an employer plan are usually much less than costs in a privately maintained plan.

TIAA-CREF supports all of these changes, because the "Retirement Savings Opportunity Act" is designed to increase what an individual saves for retirement. Americans know that they need to save for retirement, but getting started can be a challenge. The "Retirement Savings Opportunity Act of 1999" represents an important step forward. Having spent many years helping participants and plan administrators understand the complex changes made to their retirement plans that often reduced their savings opportunities, we look forward to explaining the new and greater opportunities the bill provides. Starting to defrost the contribution limits on pension plans should take the chill off our national savings rate. Increasing the contribution limit for IRAs is long overdue, since it has remained at $2,000 since 1974.

The pension bill creates an additional way for employees to make their contributions to their 403(b) retirement plans, in a manner similar to the tax treatment for Roth IRAs. This choice is a good one, especially for lower paid employees who can choose to pay the tax on their pension savings and receive their retirement income tax free. Creating this new option will broaden the appeal of saving in a 403(b) plan. For those currently saving, it provides the opportunity to save the same amount, pay tax on their contributions now and generate more net retirement income later.

We also believe the proposal to create a new broadly available retirement savings catch-up provision is good pension policy. The catch-up option will be much easier to administer than the more limited one currently available under 403(b) plans. Using an age requirement means that all employees can eventually try to make up for years earlier in their career when they could not make or afford contributions to their retirement plans. In addition, increasing the dollar limit under Section 402(g) to $15,000 from its current $10,000 amount should have a positive impact on savings.

Another important change in the bill that could help workers and families save more for retirement are the proposed changes that would eliminate the Section 415 limit that is based on 25% of compensation and correspondingly repeal the maximum exclusion allowance. For many lower paid individuals, these limits restrict the dollar amount of their retirement savings at levels well below the current $10,000 cap. In general, the multiple layering of limits on top of the MEA

calculation has restricted the amount of pretax elective contributions at a level much lower than the MEA amount and repealing the maximum exclusion allowance would greatly simplify the administration and record keeping needed in 403(b) plans.

403(b) plans provide educators and others who work for tax-exempt organizations adequate income. The pension reforms contained in the "Retirement Savings Opportunity Act" should further expand retirement savings for educators and all Americans.

One last note. Every so often, a bill is introduced in Congress that would eliminate the differences between 403(b) and 401(k) plans. TIAA-CREF, as one of the major 403(b) pension providers in the country, does not agree with this idea. The primary reason: 403(b) plans, unlike 401(k) plans, offer the Section 415 Alternative Limits and the $13,000 Section 402(g) 15-year rule. Both of these provisions work together to provide participants with potentially higher contribution limits. A second reason is that 403(b) plans are easier to administer. Form 5500 filings are less complicated, nondiscrimination testing is simpler, and IRS determination letters are not required. For anyone who is interested, I have copies of a Benefit Plan Counselor Special Report comparing and contrasting 403(b) and 401(k) plans.

VII. ANNUAL LEGAL UPDATE

A. Legal Update: 1999
An Administrative Perspective

B. Eleventh Amendment Immunity and
Academic Freedom

ANNUAL LEGAL UPDATE

A. LEGAL UPDATE: 1999
AN ADMINISTRATIVE PERSPECTIVE

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INTRODUCTION

The past year saw a number of significant decisions from the Courts and the National Labor Relations Board in such areas among others as sexual harassment, the impact of arbitration clauses on statutory claims, collective bargaining tactics, and rules governing union organizing. While most of these were cases of general applicability and not focused specifically on colleges and universities, they nevertheless are of real importance for educational institutions, their faculty and employees.

RELATIONSHIP BETWEEN STATUTORY RIGHTS AND ARBITRATION UNDER UNION CONTRACTS

In an important case from late 1998, the Supreme Court dealt with the issue of whether a union could waive an individual's right to sue his or her employer under the Americans with Disabilities Act. Before turning to that decision, it is worth reviewing the background to this question.

The passage of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967 along with many state statutes banning discrimination, created important protections for millions of American workers. For the first time employees who were terminated and believed the decision was tainted by discriminatory motives could sue in federal or state court for their jobs back.

But for those employees covered by collective bargaining agreements, the enactment of the new state and federal laws created alternative routes to remedy biased decision-making. Most unionized workers, protected by just cause provisions or antidiscrimination clauses in their collective bargaining agreements, already had

the right to grieve their dismissals to binding arbitration. The new statutes said nothing about arbitration proceedings and their effect on employees' rights under the statutes.

Not surprisingly, then, cases dealing with the procedural relationship between arbitration and the remedial processes of the new statutes began to arise. Employers argued that since unionized employees had access to arbitration procedures which resulted in binding decisions, then they should not also be allowed to file discrimination suits in state or federal court over the same issues. Or, at the very least, if the employees had had their cases heard before an arbitrator and lost, then that arbitration award should bar relief in court.

These arguments came to a head and were seemingly resolved in 1974 when the Supreme Court issued its decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 7 FEP Case 81 (1974). In *Gardner-Denver*, the issue was whether a discharged employee whose grievance had been arbitrated pursuant to a collective bargaining agreement was precluded from subsequently bringing a Title VII action for discrimination. The Court ruled that an employee who had exhausted the grievance procedure could indeed bring a Title VII action to court. In deciding this case, the Court essentially held that collective bargaining agreements do not require employees to submit statutory claims to grievance procedures. The purpose of the grievance procedure, the Court found, was simply to resolve contractual disputes arising out of the collective bargaining agreement itself. The Court wrote:

> In submitting his grievance to arbitration an employee seeks to vindicate his contractual right under a collective bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. 415 U.S. at 49-50.

The Court also referred to the limited experience of a labor arbitrator to resolve statutory claims and the fact that arbitration is based on "the law of the shop, not the law of the land" and may be influenced by the interests of the union pursuing the grievance rather than the interests of the individual. 415 U.S. at 51-53.

The Supreme Court also found in subsequent cases that labor arbitration awards would not preclude federal civil rights suits under 42 U.S.C. §1983 that are based on the same factual circumstances, *McDonald v. West Branch, Michigan*, 466 U.S. 284, (1984), or claims under the Fair Labor Standards Act, *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 24 WH Cases 1284 (1981).

The effect of *Gardner-Denver* was that employers would face the prospect of defending their actions in arbitration, perhaps prevailing and then having to still defend their actions all over again in a judicial forum.

Gardner-Denver and its progeny certainly downplayed the value of arbitration in bias cases. However, in 1991 the role of arbitration in discrimination suits was elevated in status as a result of the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 55 FEP Case 1116 (1991). In this case, the Court held that it would enforce a compulsory arbitration clause found in a securities registration agreement that an employee signed as a condition of employment such that a former employee's claim of age discrimination had to be submitted to arbitration instead of the courts.

Among his many arguments, Gilmer had vigorously asserted that the Supreme Court's decision in *Alexander v. Gardner-Denver Co.*, precluded forced arbitration of employment discrimination claims. The Court, while not wholeheartedly embracing *Gardner-Denver* and the line of cases that had followed, found distinctions between the two cases. The Court voted that *Gardner-Denver* and related cases did not involve the issue of the enforceability of an individual agreement to arbitrate statutory claims. Rather those cases involved "the quite different issue" of whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. The Court wrote:

> Since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory action. 53 FEP at 1123.

The Court also noted that since the claimants in those cases were represented by unions, "an important concern was the tension between collective representation and individual statutory rights, a concern not applicable to the present case." The fact that it was a union rather than an individual who had negotiated the arbitration language made all the difference.

Many individual agreements to arbitrate discrimination claims have been upheld by the courts since Gilmer. However, in the context of collective bargaining agreements, a number of courts ruled that pursuing a grievance to arbitration would not preclude judicial action on the same claim. These courts generally have held that *Gardner-Denver* should govern the reasoning rather than Gilmer. For example, in *Claps v. Moliterno Stone Sales*, 819 F. Supp. 141 (D. Conn., 1993), a sexual harassment case, the plaintiff had chosen not to file for arbitration under the union contract and instead filed administrative charges with the Connecticut Commission on Human Rights and the EEOC, and finally instituted judicial action in federal court. The employer moved for summary judgment arguing that the plaintiff had failed to exhaust her grievance rights under the union contract.

The court disagreed, first noting that *Gilmer* and *Gardner-Denver* are not inconsistent, the court said the *Gilmer* ruling simply applied to individual employees waiving their rights individually. In the union setting, the arbitration provision is

negotiated by the union on behalf of the unit as a whole. There is no individual waiver present as there is with single employee cases. The Board cited *EEOC v. Board of Governors of State Colleges & Universities*, 957 F.2d 424, 58 FEP 292 (7th Cir., 1992) ("it is well-established that unions cannot waive employees ADEA or Title VII rights through collective bargaining").

Thus, the Court wrote: "a collective bargaining agreement cannot — at least as a general matter — require an employee to arbitrate individual statutory claims."

However, in a revealing footnote, the court did leave open the possibility that *Gardner-Denver* could be read in a more limited fashion:

> Under this view, the exclusion of individual statutory claims from the collective bargaining process would take the form of a rebuttable presumption rather than an absolute requirement; that is, the courts would assume that individual statutory claims were excluded from the grievance procedure unless the collective bargaining agreement provided otherwise.

Many other courts have taken the same general approach that *Gardner-Denver* governs cases dealing with union-negotiated arbitration provisions. *Sewell v. New York City Transit Authority*, 809 F. Supp. 208, 60 FEP (ED NY 1992); *Hilliard v. National Council of Senior Citizens*, 1992 US Dist. LEXIS 7493. See *Griffith v. Keystone Steel & Wire Co.*, 858 F. Supp. 802, 66 FEP 227 (CD ILL 1994), where the court ruled that an employee who did not sign an individual agreement to arbitrate and who is bound only by the union's collective bargaining agreement is not required to arbitrate his Title VII claims where he is suing to enforce statutory rights and not contract rights, following *Gardner-Denver*.

But in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir., 1996), a federal appeals court by a 2-1 vote ruled for the first time that an employee cannot sue an employer for violations of Title VII without first going through the grievance procedure and arbitration procedure of her collective bargaining agreement.

In *Austin*, the employee was terminated from her position with Owens-Brockway following a workers' compensation injury. She did not grieve under her union contract but instead filed suit claiming violations of the ADA and Title VII. The lower court granted the employer's motion for summary judgment; the Fourth Circuit agreed.

After finding that the employee had standing to file a grievance had she chosen to, the Court began by noting that, even though the Federal Arbitration Act and its presumption in favor of arbitration, did not apply to collective bargaining agreements in the Fourth Circuit, the court would instead analyze the case under the general principles of federal labor law, which still favors arbitration of labor disputes.

The Court then observed that the collective bargaining agreement in question had a very broad clause banning discrimination on the basis of sex and disability. Language appeared in the agreement that specifically stated that the "contract shall be administered in accordance with the applicable procedures of the ADA" and further that the company and the union would "comply with all laws preventing discrimination against any employee because of race, color, religion, sex, national origin, age, handicap or veterans status."

The Court then reviewed the Gilmer case, citing in particular the Gilmer Court's strong presumption in favor of arbitration.

> Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced the intention to preclude a waiver of judicial remedies for the statutory rights at issue. Gilmer, 500 U.S. at 26.

The Court then went on to note that Congress had been very clear that it was in favor of, not opposed to, arbitrable remedies for Title VII claims. The Civil Rights Act of 1991, amending Title VII, itself states:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including arbitration is encouraged to resolve disputes arising under the Acts of provisions of Federal law amended by the title. Pub.L.No. 102-166, Sec. 118, 105 Stat 1071, 1081.

The ADA passed around the same time, contained identical language, the Court noted, at 42 U.S.C. Sec. 12212, thus heightening Congress' more recent intent to nudge parties toward alternative dispute resolution procedures, including arbitration. If anything the Court felt this reflected a growing sense in Congress and elsewhere that arbitration may provide an effective way of handling the growing number of discrimination claims — a different perspective from the late 1960's and 1970's.

The Court spent considerable time reviewing the many decisions in which other courts have upheld arbitration agreements between individuals and employers, even where the dispute involved Title VII or other statutory claims.

> The only difference between [those] cases and this case is that this case arose in the context of a collective bargaining agreement.... In all those cases, however, including the case at hand, the employee attempting to sue had made an agreement to arbitrate employment disputes.... So long as the agreement is voluntary, it is valid and we are of the opinion should be enforced.

The Court drew a parallel to the unions' right to negotiate away the rights of individuals to strike. "There is no reason to distinguish between a union bargaining away the right to strike and a union bargaining for the right to arbitrate. The right to arbitrate is a term and condition of employment and as such, the union may bargain for this right."

In dissent, Judge Hall wrote that he agreed that the "only difference" between the instant case and the Gilmer line of cases cited by the majority was the fact that the instant case arose under a union contract. He added, however, "the majority fails to recognize that the only difference makes all the difference. A labor union may not prospectively waive a member's individual right to choose a judicial forum for a statutory claim," citing Gardner-Denver. The dissent noted that this decision had now created a conflict in the circuits, which may ultimately have to be resolved by the Supreme Court.

Of particular help to the employer in the Austin case was the presence of detailed anti-discrimination language in the collective bargaining agreement, enhanced by references to outside discrimination laws. This language made it clear that the parties envisioned grievances and arbitration cases involving potentially, at least, interpretations of Title VII and the ADA. To the extent some courts have looked for specific intent to have arbitration cover such laws, the contract in Austin satisfied that concern. See, Claps, supra, where the court suggested that such a clear intent in the union contract might be sufficient to rebut a presumption against waiver of judicial rights.

With a split now in the circuits on this issue, the Supreme Court accepted a case that dealt with the matter directly. However, its ruling still left the issue somewhat unresolved.

In *Wright v. Universal Maritime Service Corp.*, 119 S. Ct. 391 (11/16/98), the Supreme Court did rule that an arbitration clause in the collective bargaining agreement between the International Longshoremen's Association and the employer did not obligate a longshoreman to arbitrate his statutory claim that his rights under the American with Disabilities Act had been violated.

The plaintiff in the case, Ceasar Wright, had worked for many years as a longshoreman in Charleston, S.C. After injuring his back and right heel in a 1992 work accident, he accepted a lump sum settlement of $250,000 for his permanent disability in 1994. However, his injured heel unexpectedly healed later that year and tried to get reemployment in the industries. Since he had accepted a lump sum for permanent disability, the stevedore companies refused to hire him. His union claimed that the companies misconstrued the collective bargaining agreement, but instead of filing a grievance, urged Wright to sue under the ADA in federal court.

After filing suit in 1996, Wright's case was dismissed by the U.S. District Court for South Carolina because he had failed to exhaust his contractual remedies.

The Fourth Circuit affirmed the lower court's dismissal, relying on its own decision in *Austin v. Owens-Brockway Glass Container*, 78 F.3d 875, 70 FEP Cases 272 (4th Cir., 1996), which held that a collective bargaining agreement's arbitration clause was binding on an individual employee bringing a Title VII claim.

Justice Scalia wrote the unanimous decision in Wright, observing first of all that this case brought into focus the two somewhat competing lines of authority flowing from *Alexander v. Gardner-Denver* and *Gilmer v. Interstate/Johnson Lane Corp.* However, to the disappointment of many, he found it unnecessary to completely resolve the apparent conflict because it was clear that in this case there was no clear and unmistakable waiver of statutory rights in any event.

The pertinent clauses in the collective bargaining agreement stated:

> The Union agrees that this Agreement is intended to cover all matters affecting wages, hours and other terms and conditions of employment and that during the life of this Agreement the employers will not be required to negotiate on any further matters affecting these and other subjects not specifically set forth in this Agreement. Anything not contained in this Agreement shall not be construed as being part of this Agreement.
>
> * * * * * * * * * * * *
>
> It is the intention and purpose of all parties hereto that no provision or part of this Agreement shall be violative of any Federal or State law.

Wright was also subject to the Longshore Seniority Plan that contained its own grievance provision that read:

> Any dispute concerning or arising out of the terms and/or conditions of this Agreement or dispute involving the interpretation or application of this Agreement or dispute arising out of any rule adopted for its implementation shall be referred to the Seniority Board.

Justice Scalia first noted that the Court rejected any "presumption of arbitrability" which the employers urged might derive from the Steelworkers Trilogy of cases in 1960. In that heralded group of cases, the Supreme Court had ruled that in collective bargaining agreements, there is a "presumption of arbitrability in the sense that an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." Scalia observed that the presumption "does not extend beyond the reach of the principal rationale that justifies it, which is that arbitrators are in a better position than courts to interpret the terms of a collective bargaining agreement." Since Wright's claim ultimately concerns the interpretation of a federal statute, the presumption cannot apply.

Ultimately, then, with no presumption of arbitrability to be concerned about, Scalia dealt further with the employers' argument that the ADA claims still had to be arbitrated. He wrote that the Court had indeed ruled in prior cases that a union may negotiate away individual statutory rights, but that any such waiver must be "clear and unmistakable." Justice Scalia then wrote: "We think the same standard applicable to a union-negotiated waiver of employees' statutory rights to a judicial forum for claims of employment discrimination." Carefully, and without reaching the ultimate question as to whether such a clear and unmistakable waiver would be enforceable, Scalia turned to the clause in question and ruled that it simply was not explicit and clear enough to constitute a waiver in any event. The clause had no specificity but simply referred to "matters under dispute," which Scalia said could have been meant for matters under dispute under the contract only. The contract did not even contain a specific antidiscrimination clause. While there may be some interplay between the ADA and the contract, and individual grievances may be argued in part based upon statutory questions, there was simply insufficient language in the agreement for the Court to draw any conclusion that the parties had truly intended all such statutory claims to be waived and brought to arbitration instead.

In the end, the Court dodged the ultimate question. But the Court certainly made it clear that before it would even consider reconciling the case law, the union-negotiated waiver in question would have to meet the difficult threshold test of being "clear and unmistakable."

Two recent cases cited *Wright* in rejecting employer arguments that discrimination claims were mandated under collective bargaining agreements. In *Bedew v. Mack Trucks*, (4th Cir., Nos. 97-1688/89, unpublished 2/24/99), the Fourth Circuit reinstated a disability claim of a South Carolina assembly line worker cover by a union contract between Mack Trucks and the UAW. The court — the same Court which decided the Austin case — ruled that the language of the contract did not establish a "clear and unmistakable waiver" of the statutory claims. The contract did not, for example, explicitly incorporate the statute but simply indicated that the parties would not discriminate and would support government antidiscrimination programs. The Court wrote that "this is not the same as making compliance with the ADA a contractual commitment subject to arbitration and does not constitute a clear and unmistakable waiver of a judicial forum for discrimination claims."

In the other case, *Prince v. Coca-Cola*, (SD NY, No. 97 Civ. 9539, 3/3/99), the plaintiff had alleged sexual harassment against her supervisors and retaliatory discharge under Title VII. The Court ruled that her judicial action was not barred because of the collective bargaining agreement. Once again, the Court in this case did not find a sufficient waiver. Merely incorporating an antidiscrimination clause in the collective bargaining agreement is not enough to force arbitration. The statutes were not identified by name and the agreement "failed to make full compliance with such statutes a contractual commitment that would be subject to the arbitration clause." (see Daily Labor Report, March 12, 1999, BNA)

NATIONAL LABOR RELATIONS BOARD DECISIONS FROM 1998

The NLRB issued several important decisions in 1998 affecting collective bargaining and organizational rights. Chairman William Gould closed out his term as Chairman of the NLRB with a series of important decisions that may have far-reaching effect in the years ahead to labor and management.

Collective Bargaining

In the area of collective bargaining, the Board ruled in Telescope Casual Furniture, Inc., 326 NLRB No. 60 (1998) that an employer can go to impasse on a "final proposal" and then unilaterally implement an "impasse position" containing terms much more onerous than the final proposal, for the express purpose of coercing the union into accepting its "final proposal." In that case, early in the bargaining, the employer had announced that if no agreement were reached by the contract deadline, there would probably be two company offers, a final offer and an alternative impasse proposal. As the parties moved closer to the end of the contract, the employer told the union that it would implement its "alternative impasse proposal" if the union did not agree to the more favorable "final offer" by midnight on the last day of the contract.

The union rejected the company's final offer and went on strike. The company then informed the union that the more severe "alternative proposal" would be on the table and that it may be implemented if no agreement could be reached. Several weeks after the strike began, the company implemented this alternative proposal and hired replacements.

The union filed unfair labor charges alleging that the employer had violated the Act by implementing the harsher alternative proposal and refusing to bargain over its terms.

A majority of the Board found no violation of the Act. While explaining that regressive bargaining can be evidence of bad faith and can be found to be unlawful if it is designed to frustrate agreement, the employer here was using the alternative proposal to press the union to come to an agreement on its primary proposal. Importantly, said the Board, there was also evidence that the employer was indeed willing to discuss that alternative proposal (even though the union chose not to), and that the alternative proposal had become "a bona fide proposal in its own right."

In a related case, White Cap, Inc., 325 NLRB No. 220 (1998), the Board held that an employer can withdraw from tentative agreements in collective bargaining, and make regressive proposals in their place, solely for the tactical purpose of putting pressure on the union in negotiations and not because of changed circumstances or other good cause. In that case, a tentative agreement on a whole contract had been rejected by the membership. Following the rejection, the company said it was withdrawing certain areas of tentative agreement if the contract was not ratified by a certain date. Following this date, the company presented a new offer which omitted

several important areas of agreement and put forth more onerous terms. The company said there was room to move on some of them, however.

While the union membership finally decided to ratify the earlier agreement that it had rejected, the company said that position was no longer on the table and ultimately implemented its second, more onerous proposal. Eventually, the company locked out employees for 11 months.

The Board, in a 2-1 decision, found no violations. Chairman Gould noted that this all amounted to nothing more than the "rough and tumble" of negotiations, and Member Hurtgen concluded that the company was justified in withdrawing from its negotiated agreements in order to put pressure on the union members to accept its proposal. Member Liebman dissented, arguing that the company had presented no-good faith justification for withdrawing from the tentative agreements.

Both of these decisions certainly mark a disinclination on the part of the Board to micro manage the bargaining process. However, with Member Gould gone and a new Board Chair, John Truesdale, in his place, these types of cases involving hard bargaining tactics may be revisited again in the months ahead.

No-Strike Clause

In Silver Skate Disposal Service, Inc., 326 NLRB No. 25 (1998), the Board ruled that a narrowly-drafted no strike clause did not waive the employees' rights to engage in an unauthorized work stoppage in support of a fellow employee's grievance. The clause in question read:

> ...The Union shall neither call, encourage nor condone any work stoppage, work slowdown or picketing of the employer's several premises or its trucks; and the employer will not lock out the employees covered by this agreement.

The Board, in a 3-1 decision, ruled that this language was insufficient to prohibit unauthorized strike activity by employees. The language did not constitute a "clear and unmistakable" waiver of employees' section 7 rights to strike.

Solicitation Rules

For many years, the rules under the National Labor Relations Act governing employee solicitation for union activity on an employer's premises have been relatively clear. In general terms, employers have the right to restrict employees from soliciting for union activity on employer premises while they are on working time. Employers can also prohibit the distribution of literature in working areas at any time. It has also been generally understood that the employer itself is not subject to the rules it may establish for employees. Thus, while an employer can restrict employees from handing out union literature in work areas, there is nothing illegal about an employer

enforcing such a rule while supervisors themselves hand out anti-union literature in such work areas.

However, in a decision from last summer, the National Lat or Relations Board has created considerable doubt as to whether these predictable rules will still be followed and suggested that there may be cases where an employer may not have complete freedom to use his premises to campaign against a union without affording the same privilege to union supporters. In Beverly Enterprises-Hawaii, 326 NLRB No. 37 (1998), a divided Board, while ostensibly ruling in favor of the employer, suggested that there may be circumstances where the enforcement of a no-solicitation rule by an employer who is at the same time engaging in antiunion solicitation creates such an imbalance of opportunities for communicating about unionization that enforcement of the rule against employees may be unlawful.

The case involved a nursing home situation where the union lost a close election in a service and maintenance unit. After the election, the union filed objections claiming an employer rule prohibiting distribution of union literature in working areas was overly broad and discriminatorily enforced because supervisors handed out antiunion literature in work areas while employees could not.

In a 4-1 decision, the Board agreed with the employer and overruled the union's objections. A rule prohibiting employees from distributing literature in work areas is "presumptively valid," the majority said, even if the employer's supervisors were handing out literature in work areas where employees could not. However, the reasoning of the members was sharply divergent, thus creating uncertainty for the future.

Chairman Gould dissented, stating in simple terms that the enforcement of an otherwise valid no-solicitation, no-distribution rule is automatically objectionable if the employer itself does not follow his own rule. Chairman Gould recognized this was counter to NLRB precedent but said that he would overrule such precedent.

Two members of the Board, Fox and Liebman, wrote a concurring opinion which ruled in favor of the employer but also stated that there may be circumstances where an employer will be found to engage in objectionable conduct by not adhering to its own no-distribution policy. But in the case at hand, Members Fox and Liebman concluded that the no-distribution rule did not "significantly diminish the ability of the Union to get its message to employees" nor had the employer's enforcement of the rule "to any considerable degree created an imbalance" in the relative abilities of the union and the employer to communicate with the employers. In the future, however, these matters must be closely examined on a case by case basis. Union supporters can ask employers for exceptions to the solicitation rules and if the employer refuses to allow such an exception, the employer's actions may be scrutinized as to whether or not there was an "imbalance of opportunity" for the union to get its message out to employees.

On the other hand, Members Brame and Hurtgen, in separate concurring opinions, sharply criticized Chairman Gould's dissent and the Fox-Liebman concurrence. They said that when an employer has a valid no-solicitation, no-distribution policy, the employer himself does not have to follow that rule, is free to use his own property and the employees' work time to communicate his own message against unionization and does not have to grant exceptions to the rule for union supporters. The basic right of an employer to use his free speech rights and use his own property to communicate his views of unionization must prevail in these cases. The only time it would be unlawful for an employer to enforce an otherwise valid rule against union solicitation while itself soliciting employees to oppose the union would be where an exception to the rule is requested and when employees are inaccessible and the union cannot communicate its message in any other way. These are not cases where the Board should engage in a case by case analysis to see if there was a "balance of opportunities" between the employer and the union to communicate their messages during the campaign.

Chairman Gould has since left the Board (this was one of his final opinions) and therefore there is a 2-2 split as to how such election cases will be handled in the future. The Brame-Hurtgen view is clear: an employer does not have to follow the rules for solicitation and distribution which it lays down for employees except in those very rare cases where the union cannot communicate its messages in any other way. Under this perspective, an employer can use his premises to communicate with employees at any time of the workday without worrying about giving the union supporters equal access.

But if the Fox-Liebman perspective is adopted by the Board, then an employer who has a legal no-solicitation policy and who wishes to campaign against a union, will have to worry about a union claiming that there was an "imbalance of opportunity" to campaign and that the employer's edge was so pronounced that he should not have been allowed to enforce his no-solicitation rule against employees if he himself was not going to follow it. If this type of balancing approach is used, then any defeated union may claim that management out-gunned it in resources and in manpower, that the employees were a captive audience to the supervisors all day, that handouts at the factory door could not overcome management's "in-house" advantage — all of which created an imbalance. Whether or not unions would prevail in these arguments is almost beside the point. What is important is that employers would have to think carefully about enforcing these policies and also campaigning in contravention of them. This may lead employers to hesitate to campaign or to scale back their communications for fear that they will not be able to enforce their own solicitation rules. If the Fox-Liebman view prevails, Member Brame summarized his concerns:

> As a result, cautious employers faced with demands for access, uncertain law and rising legal costs, will restrict or eliminate their campaigns, in effect abandoning their section 8(c) [free speech] rights and depriving the employees of an informed choice.

Future decisions will tell whether the Board decides to subject employers to such restrictions — and whether unions, already stepping up their organizational activities, will be given an enormous boost in the years ahead.

Unit Decisions

There was one reported unit decision from the NLRB in 1998 involving college and university faculty. In Nova Southeastern University, 325 NLRB No. 150, 158 NLRB 1153 (1998), the Board held that a unit of full-time faculty at Nova Southeastern University in Florida should include both graduate and undergraduate faculty in various programs on campus. The inclusion of the undergraduate faculty in a unit largely comprised of graduate faculty was based on the fact that they receive the same benefits as other faculty; are subject to the same policies and procedures and are engaged in the same primary function of teaching. Further, the undergraduate and graduate centers share several dual admissions programs and sometimes share faculty for particular programs. The fact that the undergraduate faculty do not employ the same academic ranking system as that of other faculty was insufficient to overcome the community of interest they otherwise share.

Sexual Harassment

In the realm of sexual harassment law, the Supreme Court gave employers and employees a certain measure of clarity with respect to the lingering question of employer liability for acts of supervisors. The question of liability in hostile environment cases had been the subject of extensive litigation since *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399 (1986). Although employers were generally always liable for the acts of supervisors in quid pro quo sexual harassment, the courts were not finding employers automatically liable in hostile environment cases, leaving that issue to be determined on a case by case basis using traditional agency principles, as the Supreme Court had suggested in *Meritor*. Thus, for over a decade, employers sought to avoid liability for the hostile environment created by supervisors on the grounds that they were unaware of the conduct, did not sanction it, had effective procedures and policies in place to combat harassment, etc.

In two cases decided the same day, *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998) and *Burlington Industries v. Ellerth*, 118 S. Ct. 2257 (1998), the Supreme Court has now established the general standard that employers are liable for acts of supervisors which lead to a hostile environment. In the *Boca Raton* case, a female lifeguard sued her employer, the City of Boca Raton, alleging that she and several other female lifeguards were subjected to sexual harassment in the form of offensive touching and lewd remarks by her supervisors. Eventually, the woman resigned without formally complaining to higher levels of authority. The Eleventh Circuit Court of Appeals had ruled against her finding no theory of liability could be applied to the City because no one at the higher levels of the City's supervisory structure knew about the harassment.

The Supreme Court, however, reversed. The Court first noted that the distinction between quid pro quo and hostile environment cases is not a meaningful one for purposes of liability. What is more important is whether the threats to an employee's terms and conditions of employment were carried out or not. In those cases where the threats are carried out, the Court held that any tangible employment action taken by a supervisor is an act of the employer. An employer is therefore subject to strict liability for sexual harassment when a supervisor actually fulfills a threat to demote, terminate or reduce salary or where other harm comes to the victim.

In the companion Burlington Industries case, the plaintiff quit her job after fifteen months of employment as a salesperson and then sued her employer for sexual harassment. The plaintiff alleged that a mid-level manager had subjected her to constant harassment, including repeated offensive remarks and gestures. She further alleged that the manager made advances towards her and threatened to deny her job benefits if she did not comply. The plaintiff never lodged a complaint with management (even though the company had a sexual harassment policy and procedure), consistently refused the manager's advances without suffering tangible detriment to her job and indeed received a promotion.

The Court stated that the general standards would be that employers are liable for the acts of their supervisors even in hostile environment cases. However, in this case, the employee had not suffered any tangible employment consequences as a result of the hostile environment created by her supervisor's behavior. Thus, the Court ruled that while the company was liable for the acts of supervisors, it could raise affirmative defenses to avoid liability.

> The defense comprises two necessary elements: (a) that the employer exercised reasonable case to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the Employer or to avoid harm otherwise.

The Court noted, however, that these defenses are not available when the employee has suffered a "tangible" adverse employment consequence, such as a demotion or discharge, as a result of the sexual harassment.

It is worth noting that several courts have already applied Burlington Industries and the Boca Raton cases to situations involving racial and other forms of harassment as well. See, *Edwards v. State of Connecticut Department of Transportation*, No. 3:97CV01046 (D. Conn., September 17, 1998)(race and sexual harassment)l *DiSanto v. McGraw Hill Inc.*, 97 Civ. 1090 (S.D.N.Y. August 10, 1998)(disability harassment); and *Wright-Simmons v. Oklahoma City*, ____F.3d____ (10th Cir., September 15, 1998) where the court held that racial harassment should be treated no differently from sexual harassment, including for purposes of applying *Ellerth* and *Faragher*. As in a sexual harassment case, therefore, an employer in a racial harassment case can successfully defend itself if it can show that it promulgated a

policy or procedure to prevent racial harassment and the aggrieved employee failed to take advantage of the corrective opportunities available. Furthermore, even if the aggrieved employee did complain, liability may be avoided if prompt action was taken.

In another area of interest, an earlier 1998 Supreme Court case, *Oncale v. Sundowners Offshore Services, Inc.*, 118 S. Ct. 998 (1998) clarified the narrower issue of same sex harassment. The Court ruled that an employee under Title VII might establish a cause of action for hostile environment sexual harassment even when the perpetrators are members of the same sex.

Finally, the Supreme Court also addressed important issues regarding sexual harassment in education under Title IX and heard arguments on the issue of institutional liability for sexual harassment between students.

Title VII of the Civil Rights Act deals with discrimination in employment, and most of the sexual harassment cases with which we are familiar arise out of this setting. However, in the educational field, schools and colleges must also be concerned with claims of sexual harassment being brought forward by students (and sometimes employees) under Title IX. Title IX of the Education Amendments of 1972 provides that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance." 20 U.S.C. §1681. The law is probably best recognized as increasing the support for women's athletic programs in colleges and universities, but its reach is much broader than that and can be used to deal with any claim of sex discrimination or sexual harassment in schools and colleges.

For some time, it was unclear whether Title IX created an independent cause of action for students who believed themselves to be the victims of sex discrimination or whether Title IX violations would be limited to cessation of federal assistance to the educational institution. The Supreme Court ruled in *Cannon v. University of Chicago*, 441 U.S. 677, that, in addition to allowing federal agencies who distribute funding to enforce the nondiscrimination provisions of the law, Title IX also creates an implied private right of action. This was followed by another major Supreme Court ruling in 1992 in the case of *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992). In that case, a student alleged that a teacher employed by the defendant school district had sexually harassed her. The Court determined that monetary damages would be available to the student in such a case, thus opening another major avenue for schools to be found liable for sexual harassment. In several cases since then, various courts have ruled that the same standards and burdens of proof found in Title VII cases should also be applied to Title IX litigation involving claims of sexual harassment.

Schools did see some measure of relief under Title IX in the 1998 Supreme Court decision in *Gebser v. Lago Vista Independent School District*. The issue in the

Lago Vista case was whether a school was liable for damages when one of its teachers carried on an illicit sexual relationship with a 15-year old student. The teacher and student were caught, the teacher arrested and discharged by the district. However, the student sued under Title IX claiming the school was vicariously liable for the actions of its teacher, even through no one at the school had any actual knowledge that the harassment was taking place and even though the student did not complain about the actions of the teacher.

The Court ruled in favor of the school, holding that damages may not be recovered for teacher-student sexual harassment in an implied private action under Title IX unless a school district official who at a minimum has the authority to institute corrective measures on the district's behalf has actual notice of and is deliberately indifferent to the teacher's misconduct.

With regard to student to student harassment under Title IX, the Supreme Court heard oral arguments in January in the case of *Davis v. Monroe County Board of Education*, (No. 97-843), a case which may decide whether schools will be liable for known harassment between students. In the Davis case, a female student was harassed by a fellow fifth grade student who tried to grab her breasts and made vulgar comments to her. Even though she and her mother complained to the principal, who did nothing, and even though she suffered psychologically from the abuse, the Eleventh Circuit Court of Appeals ruled that nothing in Title IX imposed liability on a school for student to student harassment but only reaches harassment engaged in by employees of a school district. The Courts noted, inter alia, that "the imposition of this form of liability would so materially affect schools' decisions whether to accept Title IX funding that it would require an express, unequivocal disclosure by Congress."

The Supreme Court, in accepting this case, should give all of us meaningful guidance in this important area of sexual harassment.

REFERENCES

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1. *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *Steelworkers v. American Mfg. Co.*, 363 U.S. 5664 (1960); and *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960).

2. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983)(union could waive its officers' statutory right under section 8(a)(3) of the NLRB to be free of antiunion discrimination). See also *Livada v. Bradshaw*, 512 U.S. 107, 125 (1994)(dictum); *Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399, n.9 (1988)(dictum).

3. *Lipsett v. University of Puerto Rico*, 864 F. 2d 881 (1st Cir., 1988)(holding that hostile environment claims are allowable in an employment context under Title IX); *Ward v. Johns Hopkins University*, 66 FEP Cases 872 (D. MD. 1994); *Serda v. Joseph Hancock*,

64 FEP Cases 81 (D. Kan., 1993); *Mabry v. State Board of Community Colleges*, 813 F. 2d 311 (10th Cir., 1986).

4. ____U.S.____ (June 22, 1998).

5. 120 F. 3d 1390 (11th Cir., 1997).

6. 120 F. 3d at 1401.

ANNUAL LEGAL UPDATE

B. ELEVENTH AMENDMENT IMMUNITY AND ACADEMIC FREEDOM

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ELEVENTH AMENDMENT IMMUNITY

Three years ago the U.S. Supreme Court handed down a revolutionary decision known as *Seminole Tribe v. State of Florida*.[1] It is not an exaggeration to say that this single court decision has the potential to severely weaken or even abrogate federal civil rights protections for faculty employed by public colleges and universities.

We do not yet know the full extent of the damage this ruling will cause. But while the jury's still out, the preliminary signs are not good. That's the bad news. The good news is that most of the problems caused by *Seminole Tribe* can be remedied through the collective bargaining process.

I noticed that the next session of this conference includes a discussion of the rights of higher education faculty under three federal laws: the Age Discrimination in Employment Act (ADEA), the Family and Medical Leave Act (FMLA), and the Americans with Disabilities Act (ADA). Well, I hope you enjoy the discussion this year because, by next year, you may not have any rights under those three laws to discuss. That is because of Eleventh Amendment immunity of states, which was resurrected by the Supreme Court in *Seminole Tribe*. Let me give you some examples.

Last year, in a case called *Kimel v. Florida Board of Regents*,[2] the U. S. Court of Appeals for the Eleventh Circuit ruled that faculty members in the University of Florida system cannot sue the university for violating their rights under the Age Discrimination in Employment Act. Why not? Because the Court determined that such a claim is barred by the immunity conferred upon the states by the Eleventh Amendment to the United States Constitution. In another ADEA case involving a University of Minnesota professor, the Eighth Circuit Court of Appeals last year reached the same conclusion.[3]

Also last year, two federal courts ruled that employees at the University of Ohio[4] and the University of Alabama[5] cannot sue their schools for violating their

rights under the Family and Medical Leave Act. Why not? Eleventh Amendment immunity. A federal court in Maryland has issued a similar decision.[6]

Finally, within the last two years, federal courts in Ohio,[7] North Carolina,[8] and Alabama[9] have issued rulings that state workers (and this includes the employees of public colleges and universities) cannot sue their employers in federal court for violating their rights under the Americans with Disabilities Act. Why not? Eleventh Amendment immunity.

So what is this Eleventh Amendment immunity? Article I of the U. S. Constitution grants Congress certain specific -- but limited -- powers. Congress can pass laws, for example, to "regulate interstate commerce" or to "provide for a common defense," and it can levy taxes and spend money.

At the same time, the Eleventh Amendment to the Constitution limits the power of federal courts to hear certain cases. In non-lawyer's language, the Eleventh Amendment says this: individuals can't sue states in federal court.[10] States are immune from suit in federal court. The term "state," of course, has been construed to include state entities such as public colleges and universities.

Read together, these two provisions of the Constitution set up a potential conflict. Can Congress, exercising its powers under Article I (*e.g.*, the power to regulate interstate commerce), pass a law that permits individuals to sue states in federal court? In a 1989 decision called *Pennsylvania v. Union Gas Co.*,[11] the Supreme Court said yes. The vote was 5-4. The Court, in effect, said that Article I trumps the Eleventh Amendment.

But over the next six years, the Supreme Court changed personnel: Justices Brennan, Marshall, and Blackmun all resigned. After the Court changed personnel, it changed its mind.

In a 1996 case called *Seminole Tribe v. State of Florida*, the High Court overturned *Union Gas* -- by a 5-4 vote -- and ruled that Congress does **not** have the power under Article I of the Constitution to abrogate a state's Eleventh Amendment immunity from suit in federal court. The Court reasoned that, since the Eleventh Amendment was ratified nine years after the Constitution was adopted, it necessarily acts as a limitation on the power of Congress to legislate under Article I.

THE IMPACT OF *SEMINOLE TRIBE*

But what does any of this have to do with the civil rights of higher education faculty? Over the last 25 years, Congress has enacted about ten different federal laws that provide civil rights protections for the employees of public institutions of higher education.[12] Some of these statutes ban discrimination on the basis of race, gender, disability, and age. Other laws affirmatively grant employees certain job benefits, such as the right to unpaid family and medical leave, overtime pay, and minimum wage.

Significantly, if the educational institution violates any of these federal laws, then the employee who is the victim of discrimination or has been denied the statutory benefit has the right to sue the institution in federal court, at least under current law.

But the $64,000 question is this: Are these civil rights laws still valid in the wake of *Seminole Tribe*? Stated differently, does Congress have the constitutional power to ban discrimination in public institutions of higher education and to give the victims of discrimination the right to sue these institutions in federal court?

Since *Seminole Tribe* was decided three years ago, there have been more than 70 reported court decisions in which state defendants who were sued for violating various federal civil rights laws claimed Eleventh Amendment immunity. The results, to put it mildly, have been mixed.

Many courts have found a "loophole," a way to get around the harsh result of *Seminole Tribe*. And that loophole is the Fourteenth Amendment.

The Fourteenth Amendment, which was ratified soon after the Civil War, prohibits states from denying to citizens the "Equal Protection of the laws." Section 5 of the Fourteenth Amendment also specifically grants Congress the power to pass legislation to enforce the mandates of the Fourteenth Amendment. So the Courts are interpreting *Seminole Tribe* to mean that, even though Congress does not have the power under Article I of the Constitution to abrogate a state employer's Eleventh Amendment immunity, Congress still has the power to do that under section 5 of the Fourteenth Amendment, so long as the legislation is designed to enforce a right found in the Fourteenth Amendment itself. Stated differently, even though the Eleventh Amendment took away Congress' power to pass laws allowing states to be sued in federal court, that power was partially restored by the Fourteenth Amendment.

How are these legal principles playing out in court? In a word, it's a mess. As the cases cited in notes 3-9, below, document, the courts are fairly evenly split on the question whether Congress has the power to extend to higher education employees the protections of the ADEA, the FMLA, and the ADA.

As to several of the other laws, however, the results are not so mixed. In cases involving employee rights to minimum wage and overtime protection under the Fair Labor Standards Act, for example, the lower courts have ruled 15-0 that state employers are entitled to Eleventh Amendment Immunity.[13] On the other hand, lower courts have ruled 4-0 that state employers are not immune from suit for violations of Title VII (race, sex, religion, color, and national origin).[14] Similarly, by a 4-to-0 margin, the lower courts have held educational institutions can be sued by individuals for violating Title IX, which prohibits gender discrimination in schools that receive federal funds.[15]

A few weeks ago the Supreme Court decided to reenter the fray and agreed to review the *Kimel* case I mentioned at the beginning of this presentation. That's

the NEA-funded case from Florida that presents the question whether Congress has the power under the Fourteenth Amendment to extend the protections of the Age Discrimination in Employment Act to the employees of public colleges and universities. The case will be argued this fall, and we expect a decision from the Court sometime after the first of the year. That decision will give us some idea whether higher education faculty are covered by most of the other federal civil rights laws as well.

[After this paper was delivered in April, 1999, the Supreme Court handed down three significant Eleventh Amendment decisions. In companion cases from Florida, the Court ruled that state agencies, including public colleges and universities, are immune from suit for violations of the federal patent infringement and trademark infringement laws.[16] The Court said that Congress does not have the power to abrogate the states' Eleventh Amendment immunity from suit for these kinds of statutory violations. The High Court also held that Eleventh Amendment immunity applies to suits based on federal law brought in *state* court, not just federal court.[17] This means that a state entity, including public colleges and universities, cannot be sued in state court for violating federal law.]

BARGAINING SOLUTIONS

One important thing to remember about this otherwise gloomy news is that employees don't have to rely on how the Supreme Court rules in *Kimel* -- or any other case -- to enjoy full civil rights protection. That is so because the *Seminole Tribe* problem can be solved through collective bargaining. Even if the Supreme Court says Congress doesn't have the power to extend the coverage of all these federal laws to institutions of higher education, employees still can insure the same protection in collective bargaining agreements. There are at least three possible bargaining solutions:

1. First, it may be sufficient to include in the agreement a clause in which the employer agrees to waive its Eleventh Amendment immunity. States, if they choose, can waive their immunity,[18] although to be effective, the waiver would have to be fairly explicit. This would permit aggrieved employees to sue the school in federal court for violations of their federal rights.

2. Second, and this may be the more attractive option, the employer and union can agree that all employment disputes arising under the various federal civil rights statutes will be resolved through binding arbitration. The arbitrator would apply substantive federal law and award all remedies that would otherwise be available to the employee in federal court.

3. Third, without specifically referencing federal law, the collective bargaining agreement itself can prohibit discrimination based on the same categories as federal law and can provide for the same kinds of rights and benefits created by FMLA, the FLSA, and the other federal laws.

In sum, *Seminole Tribe* is a radical decision that fundamentally changed the balance of power between Congress and the states. The good news, of course,

is that, where collective bargaining is permitted, higher education faculty can bargain for civil rights protection, and they need not be bound by the Supreme Court's eighteenth century view that the King can do no wrong and public sector employees serve at the pleasure of the sovereign state.

ACADEMIC FREEDOM

I would like to shift gears now to the topic of academic freedom. Other papers address threats to academic freedom from the *outside*: SLAPP suits brought by corporations and political pressure applied by elected officials. My focus will be on the threats to academic freedom from the *inside*, from the institution itself, cases in which the institution punishes the teacher or professor for what he or she says in the classroom.

The news is not good. Appellate courts have decided five academic freedom cases in the last twelve months, and the teacher or professor lost every time.[19]

In brief, the courts are making a critical and dispositive distinction between faculty speech outside the classroom and faculty speech inside the classroom. As to the former, the courts generally grant First Amendment protection to speech outside the classroom, so long as the teacher or professor is speaking as a "citizen" on a matter of "public concern" rather than as an employee on a matter involving a personal complaint or internal institutional policy.[20]

As to speech inside the classroom, however, recent court decisions suggest that there is no First Amendment protection. When faculty members "speak" in their role as teachers, the courts say, they are speaking as employees. And when they speak in their role as employees, the employer -- the school district or university -- can tell them what to say and punish them for disobeying. Three recent federal appellate court decisions graphically illustrate this point.

1. *Boring v. Buncombe County Board of Education*. Margaret Boring was a high school drama teacher who was demoted because members of her school board didn't like the controversial ideas contained in the award-winning play *Independence* she selected for her students to perform in a North Carolina state competition. She challenged her punishment on First Amendment grounds and actually won a significant victory when a three-judge panel of the U.S. Court of Appeals for the Fourth Circuit ruled that the doctrine of academic freedom protects teachers "both inside and outside the classroom."[21]

Her victory was short-lived, however. The entire Fourth Circuit voted to rehear the case *en banc* and ruled by a 7-6 margin last year that high school teachers have no right to academic freedom.[22] The court said that Boring could not challenge her punishment because it arose from a curricular dispute, and "the school, not the teacher, has the right to fix the curriculum."[23] "[T]eachers," the court added, have no "First Amendment right to participate in the makeup of the school curriculum."[24] The six dissenting judges complained that the majority's

"astonishing" opinion "eliminates *all* constitutional protection for the in-class speech of teachers" and "extinguishes First Amendment rights in an arena where the Supreme Court has directed they should be brought 'vividly into operation.'"[25] The U. S. Supreme Court last year refused to review the Fourth Circuit's unfortunate ruling.[26]

Even though the *Boring* decision involved the rights of a *high school* teacher, it has been accepted and uncritically applied to defeat the academic freedom claims of *higher education* faculty in two subsequent appellate court decisions.

2. *Edwards v. California University of Pennsylvania.* In this case, a Pennsylvania college professor was suspended for failing to follow the university's approved curriculum. Edwards had used his own syllabus rather than the one adopted by his department. He filed a federal lawsuit challenging his discipline, as well as certain restrictions the university placed on his choice of classroom materials. Citing the *Boring* decision, the U. S. Court of Appeals for the Third Circuit last year flatly rejected his academic freedom claim. The court said:

> [A]lthough Edwards has a right to advocate outside of the classroom for the use of certain curriculum materials, he does not have a right to use those materials in the classroom.... Our conclusion that the First Amendment does not place restrictions on a public university's ability to control its curriculum is consistent with the Supreme Court's jurisprudence concerning the state's ability to say what it wishes when it is the speaker.... [Here] the university was acting as speaker and was entitled to make content-based choices in restricting Edward's syllabus.[27]

Last February, the Supreme Court refused to review the *Edwards* decision.[28]

3. *Urofsky v. Gilmore.* Six professors employed by various public colleges and universities in Virginia brought this lawsuit challenging a state law that prohibited state employees -- including public higher education faculty -- from using state-owned computers to access "sexually explicit material" on the Internet. Despite the professors' compelling arguments that the restriction severely hampered their ability to teach, to assign student online research projects, and to conduct research on the Internet themselves, the Fourth Circuit Court of Appeals last February upheld the law.

What is particularly chilling about the court's decision, though, is its dismissive treatment of the professors' academic freedom claim. Without discussing the differences between higher education and K-12 or otherwise analyzing the policy arguments about the special need for free inquiry and the "marketplace of ideas" on college campuses, the court simply dropped a footnote stating in a single sentence that "Plaintiffs' claim that the Act violates their First Amendment right to academic freedom is foreclosed by our *en banc* decision in *Boring*."[29] In effect, the court is saying that, after *Boring*, higher education faculty have no right to academic freedom.

These are troubling decisions. They illustrate a disturbing trend in the courts and signal a very real curtailment of the free speech rights of college and university faculty, at least when speaking in their roles as employees. Although the Supreme Court has not yet clearly spoken on this issue, there is little reason to hope that, with the current cast of characters, the High Court will step in and stem this dangerous tide.

ENDNOTES

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[1] 517 U. S. 44, 116 S. Ct. 1114 (1996).

[2] 139 F.3d 1426 (11th Cir. 1998), *cert. granted*, 119 S. Ct. 901 (1999).

[3] *Humenansky v. Board of Regents*, 152 F.3d 822 (8th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3504 (U.S. Feb. 1, 1999) (No. 98-1235). Other courts have taken a contrary view and ruled that state colleges and universities *can* be sued for ADEA violations. *Goshtasby v. Board of Trustees of the Univ. of Illinois*, 141 F.3d 761 (7th Cir. 1998); *Scott v. University of Mississippi*, 148 F.3d 493 (5th Cir. 1998); *Keeton v. University of Nevada System*, 150 F.3d 1055 (9th Cir. 1998); *Coger v. Board of Regents of the State of Tennessee*, 154 F.3d 296 (6th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3364 (U.S. Nov. 16, 1998) (No. 98-821); *Hurd v. Pittsburgh State Univ.*, 109 F.3d 1540 (10th Cir. 1997).

[4] *Thompson v. Ohio State Univ.*, 5 F. Supp. 2d 574 (E.D. Ohio 1998) (appeal pending).

[5] *Garrett v. Bd. of Trustees of Univ. of Alabama*, 989 F. Supp. 1409 (N.D. Ala. 1998).

[6] *Knussman v. State of Maryland*, 935 F. Supp. 659 (D. Md. 1996). At least one court has taken a contrary view and ruled that state entities *can* be sued for FMLA violations. *Joliffe v. Mitchell*, 986 F. Supp. 339 (W.D. Va. 1997).

[7] *Garrett v. Board of Trustees of Univ. of Alabama*, 989 F. Supp. 1409 (N.D. Ala. 1998).

[8] *Brown v. North Carolina Div. of Motor Vehicles*, 987 F. Supp. 451 (E.D.N.C. 1997).

[9] *Nihiser v. Ohio Envtl. Protection Agency*, 979 F. Supp. 1168 (S.D. Ohio 1997). Other courts have taken a contrary view and ruled that state entities *can* be sued for ADA violations: *Autio v. AFSCME, Local 3139*, 140 F.3d 802 (8th Cir. 1998); *Clark v. State of California*, 123 F.3d 1267 (9th Cir. 1997), *cert. denied sub nom., Wilson v. Armstrong*, 118 S. Ct. 2340, 141 L. Ed. 2d 711 (1998); *Kimel v. State of Florida Bd. of Regents*, 139 F.3d 1426 (11th Cir. 1998), *cert. granted*, 119 S. Ct. 901, 142 L. Ed. 2d 901 (1999), *and cert. granted sub nom. U.S. v. Florida Bd. of Regents*, 119 S. Ct. 902 (1999); *Coolbaugh v. State of Louisiana*, 136 F.3d 430 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 58, 142 L. Ed. 2d 45 (1998).

[10] The text of the Eleventh Amendment provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity,

commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

[11] 491 U.S. 1, 109 S. Ct. 2273, 105 L. Ed. 2d 1 (1989).

[12] Federal civil rights laws that provide protection and certain benefits for most employees of public colleges and universities include: Title VI (race), Title VII (race, gender, religion, color, national origin), Title IX (gender), Section 504 of the Rehabilitation Act of 1973 (disability), Americans with Disabilities Act (disability), Equal Pay Act (gender), Age Discrimination in Employment Act (age), Family and Medical Leave Act (unpaid leave for certain purposes), Fair Labor Standards Act (minimum wage and overtime requirements) (covers only non-professional staff), Uniformed Services Employment and Reemployment Rights Act (military service).

[13] *Mills v. State of Maine*, 118 F.3d 37 (1st Cir. 1997); *Close v. State of New York*, 125 F.3d 31 (2nd Cir. 1997); *Balgowan v. State of New Jersey*, 115 F.3d 214 (3rd Cir. 1997); *Aaron v. State of Kansas*, 115 F.3d 813 (10th Cir. 1997); *Wilson-Jones v. Caviness*, 99 F.3d 203 (6th Cir. 1996), *opinion amended on denial of rehearing*, 107 F.3d 358 (6th Cir. 1997); *Bergemann v. State of Rhode Island*, 958 F. Supp. 61 (D.R.I. 1997); *Abrill v. Commonwealth of Virginia*, 145 F.3d 182 (4th Cir. 1998); *Frazier v. Courter*, 958 F. Supp. 252 (W.D.Va. 1997); *Palotai v. University of Maryland College Park*, 959 F. Supp. 714 (D.Md. 1997); *Digiore v. State of Illinois*, 962 F. Supp. 1064 (N.D.Ill. 1997); *Rehberg v. Department of Pub. Safety*, 946 F. Supp. 741 (S.D.Iowa 1996), *aff'd* 117 F.3d 1423 (8th Cir. 1997); *Raper v. State of Iowa*, 940 F. Supp. 1421 (S.D. Iowa 1996), *aff'd* 115 F.3d 623 (8th Cir. 1997); *Walden v. Florida Dep't of Corrections*, 975 F. Supp. 1330 (N.D.Fla. 1996); *Adams v. State of Kansas*, 934 F. Supp. 371 (D.Kan. 1996) *aff'd* 116 F.3d 489 (10th Cir. 1997); *Chauvin v. State of Louisiana & Dep't of Wildlife*, 937 F. Supp 567 (E.D.La. 1996).

[14] *Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833 (6th Cir. 1997); *Varner v. Illinois State Univ.*, 972 F. Supp. 458 (C.D.Ill. 1997), *aff'd* 150 F.3d 706 (7th Cir. 1998); *Ussery v. State of Louisiana through Dep't of Health*, 150 F.3d 431 (5th Cir. 1998); *Ghert v. University of Illinois at Urbana-Champaign*, 974 F. Supp.1178 (D.C.Ill. 1997).

[15] *Crawford v. Davis*, 109 F.3d 1281 (8th Cir. 1997); *Doe v. University of Illinois*, 138 F.3d 653 (7th Cir. 1998); *Franks v. Kentucky School for the Deaf*, 142 F.3d 360 (6th Cir. 1998); *Lam v. Curators of the Univ. of Missouri, at Kansas City Dental School*, 122 F.3d 654 (8th Cir. 1997).

[16] *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, ___U.S. ___, 67 U.S.L.W. 4580 (1999); *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, ___U.S. ___, 67 U.S.L.W. 4590 (1999).

[17] *Alden v. Maine*, ___U.S. ___, 67 U.S.L.W. 4601 (1999).

[18] *Clark v. Barnard*, 108 U.S. 436 (1883).

[19] *Boring v. Buncombe County Bd. of Ed.*, 136 F.3d 364 (4th Cir. 1998) (*en banc*), *cert. denied*, ___ U.S. ___, 119 S. Ct. 47, 142 L. Ed. 2d 36 (1999); *Edwards v. California Univ. of Pennsylvania*, 156 F.3d 488 (3rd Cir. 1998), *cert. denied*, 119 S. Ct. 1036, 143 L. Ed. 2d 44 (1999); *Urofsky v. Gilmore*, 167 F.3d 191 (4th Cir. 1999); *Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, *rehearing denied*, 154 F.3d 904 (8th Cir. 1998), *cert. denied*, ___ U.S. ___ (1999); *Board of Educ. of Jefferson County Sch. Dist. R-1*, 960 P.2d 695, 128 Ed. Law Rptr. 378 (Colo. 1998).

[20] *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983).

[21] *Boring v. Buncombe County Bd. of Ed.*, 98 F.3d 1474 (4th Cir. 1996).

[22] *Boring v. Buncombe County Bd. of Ed.*, 136 F.3d 364 (4th Cir. 1998) *(en banc)*, *cert. denied*, 119 S. Ct. 47 (1998).

[23] *Id.* at 370.

[24] *Id.* at 371.

[25] *Id.* at 380.

[26] *Boring v. Buncombe County Bd. of Ed.*, 119 S. Ct. 47 (1998).

[27] *Edwards v. California Univ. of Pennsylvania*, *supra*, *note 19*, 156 F.3d at 492-93.

[28] *Supra, note* 19.

[29] *Urofsky v. Gilmore*, *supra*, *note 19*, 167 F.3d at 196, n.8.